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NOTES.

A Newly Discovered Ordinance.

MAGNA CARTA as issued in 1217 contained the following chapter:—

'Nullus liber homo de cetero det amplius alicui vel vendat de terra sua quam ut de residuo terre sue possit sufficienter fieri domino feodi servitium ei debitum quod pertinet ad feodum illud.'

The precise effect of this provision has been much discussed. Mr. Challis remarks that 'the practical result of the partial restraint upon alienation imposed by Magna Carta, cap. 32, was that lords exacted a fine upon alienation as the price of their consent, without which the tenants could not make a safe title.' On the other hand, the authors of the History of English Law before the Reign of Edward I take the view that the consent of a mesne lord to an alienation by his tenant was not required so long as this 'vague provision' was not violated. But whatever may be its meaning, tenants in chief during the latter half of the thirteenth century and long afterwards required the king's leave before alienating any part of their lands. Thus in the forty-fourth year of Henry III Gilbert de Preston obtained licence[1] from the king to assign a portion of his manor of Gretton in the county of Northampton; and on the early Fine Rolls of Edward I we find writs ordering the sheriffs to seize into the king's hands lands alienated without his licence. Clearly at this time a tenant in chief had not free power of alienation; though earlier in the reign of Henry III there are no traces of any consent on the king's part being required. Even when *Quia Emptores* declared that every free man should have the right of selling his lands at his own pleasure, it was judicially decided that this statute did not apply to tenants in chief; and the law remained unaltered until 1327, when another statute provided that the king should only be entitled

[1] Pat. Roll 71, m. 9.

to a reasonable fine on alienation, and not to a forfeiture if the lands were alienated without his licence.

Now the Year Books show that in the reign of Edward III the origin of this restraint was discussed more than once in open court. One lawyer thought it dated from the twentieth, another from the thirtieth year of Henry III. They speak of the king's prerogative, referring, no doubt, to chapter viii of *Prerogativa Regis*, one of the Statuta Incerti Temporis. A few years later we find a statement on the Rolls of Parliament [1] that the restraint was commenced in the time of Edward I by the *Prerogativa Regis*. But this statute, if it can be called a statute, was certainly not enacted in the twentieth or the thirtieth year of Henry III, for the name of Edward I occurs in its fourth chapter. Possibly the date assigned to it in the Rolls of Parliament is correct; but the rest of the statement there is undoubtedly false. The true origin of the restriction is an ordinance published in the fortieth year of Henry III, the existence of which has hitherto escaped the notice of historians.

It is in these words:—

'Rex [2] vicecomiti Eboraci salutem. Quia ad dampnum nostrum grauissimum et Corone et dignitatis regie lesionem intollerabilem est manifeste quod quilibet ingreditur baronias et feoda que de nobis tenentur in capite in regno et potestate nostra pro voluntate eorum qui baronias et feoda illa de nobis tenent per quod wardas et escaetas amittimus et barones nostri et alii qui baronias et feoda illa de nobis tenent adeo decrescunt quod seruicia nobis inde debita sufficienter facere nequeunt vnde corona nostra grauiter leditur quod diucius nolumus sustinere de consilio nostro prouidimus quod nullus decetero baroniam vel aliquod feodum quod de nobis teneatur in capite per empcionem uel alio modo ingrediatur sine assensu et licencia nostra speciali. Et ideo tibi precipimus districte in fide qua nobis teneris et sicut te ipsum et omnia tua diligis quod non permittas aliquem decetero baroniam aut aliquod feodum quod de nobis teneatur in capite in balliua tua per empcionem aut alio modo ingredi sine assensu et licencia nostra speciali. Et si quis baroniam aut feodum aliquod quod de nobis tenetur in capite in balliua tua contra hanc prouisionem nostram ingrediatur tunc terram quam eo modo ingressus fuerit capias in manum nostram et eam saluo custodias donec aliud inde preceperimus. Et ita te habeas in hoc mandato nostro exequendo quod pro defectu uel negligencia tua dampnum in hac parte aut lesionem corone vel dignitatis nostre non sustineamus propter quod ad te et tua grauiter carere [3] debeamus. Teste Rege apud Bristollium xv die Julii.

'Eodem modo mandatum est singulis vicecomitibus Anglie. Teste ut supra.'

This ordinance occurs on the Close Roll of the year of its publication, close to the *Provisio de anno bissextili et die* of the Statutes

[1] Rot. Parl. ii. p. 265. [2] Close Roll 74, m. 7, in dorso. [3] *sic.*

of the Realm; and it is remarkable that it should have remained so long undiscovered. The introductory recital which speaks of the loss of wardships and escheats bears some resemblance to that of *Quia Emptores*, and shows that the restraint on alienation of lands held of the king in chief arose from a different cause from that of the thirty-second chapter of the Magna Carta of 1217. Finally, our ordinance sets at rest the question of the right of mesne tenants to alienate without the consent of their lords. If before the year 1256 the king's tenants could alienate without licence, we may be quite sure that mesne tenants could do likewise.

G. J. TURNER.

TALTARUM'S CASE.

The true name of this case is Talcarne's or Talcarn's. Professor Maitland has already noticed (L. Q. R. ix. 1) that the fourth letter of the name is a *c*, not a *t*, so only the seventh and eighth need comment. The seventh will read either as an *u* or as an *n*; if it be an *u*, the horizontal line drawn above it in the roll will undoubtedly represent an *n*. But if it be an *n*, the horizontal line will either be a flourish, or it will represent a final *e*. The last letter of Glyn, the name of Thomas 'Taltarum's' attorney, has a similar line above it, and so have many other names on the same roll ending in *u* or *ne*. There are two places called Tolcarn in Cornwall, and Tolcarn is a Cornish family name. On the other hand, Taltarum lives only in the Year Books. The name of Talcarn occurs frequently on the De Banco Rolls *tempore* Edward IV, and it is always written in the same fashion. One litigant was Talcarn of Talcarn, surely he was not Talcarum of Talcarum!

G. J. TURNER.

Mr. Thomas Barclay, in his article on the Nationality of Children (LAW QUARTERLY REVIEW, vol. xii. p. 280), states that nothing in the Naturalization Act, 1870, qualifies a naturalized British subject to be the owner of a British ship. This seems to be an error. Section 7 confers on a naturalized British subject all the rights of a natural born British subject, and the provision in section 14 that nothing in the Act shall qualify an alien to be the owner of a British ship applies only to unnaturalized aliens, and is intended to withdraw British ships from the operation of section 2 conferring a general right of holding real and personal property on unnaturalized aliens.

The Merchant Shipping Act of 1894, section 1, enumerates naturalized persons amongst those who are qualified to be owners of British ships, but adds the additional requirement that during the time a naturalized person is owner, he shall be either resident in Her Majesty's dominions or partner in a firm actually carrying on

business there. The section also requires that he should have taken the Oath of Allegiance, but in this respect it adds nothing to the Naturalization Act, which already requires that ceremony as a condition precedent to the certificate of naturalization taking effect.

THOMAS GREEN.

In no province of law do American decisions tell for so much with English judges as in the domain of private international law, and no American tribunal enjoys, on the whole, anything like the repute of the Supreme Court of the United States. Our readers therefore will do well to note the case of *Hilton* v. *Guyot*, 159 U. S. 113.

That case decides that a judgment for a sum of money rendered by a Court of a foreign country having jurisdiction of the cause and of the parties in a suit brought by one of its citizens against an American citizen is prima facie evidence only, and not conclusive of the merits of the claim in an action brought in the United States upon the judgment, if by the law of the foreign country, as in France, judgments of American Courts are not recognized as conclusive.

This decision claims to be grounded in principle on English authorities, which are set forth with extraordinary learning and elaboration by Mr. Justice Gray, who delivers, and it may be conjectured, drew up, the judgment; but an English critic, whilst feeling the most unfeigned deference both for the Supreme Court and for the very eminent judge who was on this occasion their spokesman, must pronounce the judgment to be erroneous in principle. That this is so appears from the following considerations.

1. No English judgment or English writer of authority sanctions the doctrine of reciprocity.

2. The notion that a judgment is merely prima facie evidence of a debt, though many dicta can be cited in its support, is in reality obsolete, and as has been pointed out by lawyers of authority, is inconsistent with the effect now given in England to the judgments of foreign courts of competent jurisdiction.

3. The judgment in *Hilton* v. *Guyot* rests in substance on the untenable doctrine that rights acquired under the law of a foreign country are recognized in England or in the United States out of comity or politeness, whence logically enough follows the conclusion that such recognition depends upon reciprocity. If France has not the good manners to enforce an American judgment, American Courts may, it is argued, show their displeasure by refusing to enforce a French judgment. What is forgotten by those who adopt this point of view is that the extra-territorial

recognition of rights is a matter of justice or of expediency in a wide sense of that term. It has nothing whatever to do with courtesy.

4. The decision in *Hilton* v. *Guyot* rests at bottom on the failure of the majority of the Supreme Court to perceive that the so-called enforcement of a foreign judgment is in truth nothing but the recognition of a right acquired by *A* against *X* under a foreign law. There is much to be said for, and something, perhaps, though not much, against the recognition by one country of rights acquired under the law of another country, or to use a brief term of foreign rights; but whatever reasons there are for recognizing a duly acquired foreign right at all tell in favour of giving effect to a right acquired under a foreign judgment. Such a right is simply one among many rights acquired under foreign law. On this matter the dissenting opinion of the minority of the Supreme Court admirably hits the true point. 'In any aspect,' says Chief Justice Fuller, 'it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where it is sought to be done.'

This is good logic and sound doctrine; it is propounded by the Chief Justice and supported by three other judges of eminence. The Supreme Court is not bound by its own decisions, and every one who perceives the importance of the extra-territorial recognition of rights must hope that the Court will soon overrule *Hilton* v. *Guyot*.

The decision of the Court of Appeal in *Pugh* v. *L. B. & S. C. R. Co.* ('96, 2 Q. B. 248, 65 L. J. Q. B. 521) avoids expressing actual dissent from that of the Judicial Committee, which has been freely criticized by private writers, in *Victorian Ry. Commissioners* v. *Coultas* (13 App. Ca. 222). But it certainly tends to diminish the weight of that case in English Courts. The Judicial Committee held that physical illness caused by fright, which fright was a natural consequence of the defendant's negligence, is too remote a consequence to be a cause of action. The Court of Appeal has held that incapacity to follow a signalman's employment, due to a shock to the nerves caused by the responsibility of suddenly dealing with imminent danger, is within a policy covering accidents on duty. This, we submit, is both better sense and better law than the doctrine of the Judicial Committee.

We cannot live in a world where nobody is to be trusted, nor does the law require us to adopt so cynical an attitude towards our fellow-men. It requires of us care, not suspicion. It requires the auditor, for instance, to be as Lopes L.J. said in *In re Kingston Cotton Mills Co.* ('96, 2 Ch. 279, 65 L. J. Ch. 673, C. A.), a watch-dog, not a bloodhound. He must inquire into the substantial accuracy of a balance sheet, not merely verify the arithmetic, but he is not to be held liable for not tracking out carefully laid schemes of fraud. He is not an insurer: he does not even guarantee that the books of a company do correctly show the true financial position of the company. If a trusted manager of a company fraudulently inflates the stock account, as he did in *In re Kingston Cotton Mills Co.*, the auditor has a right to assume, if there is nothing to excite his suspicion, that the manager's statement is correct—for looking at it from a practical point of view how can he, the auditor, go through the stock himself? He is incompetent for such a task. So, if the company does part of its business abroad, the auditor cannot be expected to verify the fluctuating rates of exchange; and in the case of a society which receives subscriptions he not only does but must take the treasurer's word for it that all subscriptions paid direct to the treasurer have been accounted for. But more than that, the auditor is entitled to say to the shareholders to whom he makes his report, 'These persons, the manager, the directors, &c., are your appointees. I assume—I have a right to assume, as against you at all events—that their statements are trustworthy.' It may be said, it was said in the Kingston Cotton Mills case, 'What is the use of an auditor if he cannot discover fraud?' The answer is that no one, auditor or anybody else, can always detect or prevent fraud, but the scrutiny of an audit, imperfect as it may be, does in practice deter very effectively the would-be perpetrators of fraud.

The would-be repealers of section 25 of the Companies Act, 1867—the cash payment section—may find an apt illustration for their text in two recent cases, *In re Veuve Monnier et Fils* ('96, 2 Ch. 525, 65 L. J. Ch. 748, C. A.) and *In re Alkaline Co.* (12 Times R. 534). The first was a case of a mortgagee advancing £1,600 to a company on shares which he innocently imagined to be paid up; and of course losing his loan as well as paying ten times its amount in calls. The other was a case of gentlemen of the fashionable world, unacquainted with the arts of the promoter, accepting a bonus share of £1,000 a piece for subscribing some of the capital, and finding their bonus transmuted into a serious liability. They were hard cases, no doubt, but the true moral of them is that unsophisticated laymen must not enter into con-

tracts affected by section 25 without advice. Section 25 is a dangerous kind of explosive and can only be safely handled by experts. The Statute of Frauds is a similar instance of a statute which may and does work injustice at times. Nevertheless the Statute of Frauds embodies an important principle of public policy —that certain classes of contract are not to be left to rest on the frail testimony of memory—and we must take the bad with the good. Section 25, too, embodies an important principle, viz. that where a company has the privilege of trading with limited liability, the privilege is only to be purchased on the terms that the limited capital shall not be a sham. It would speedily become so if shares were allowed to be paid for in any kind of consideration without any certain criterion of value. Compared with the maintenance of this,—the first condition of soundness in co-operative trading, occasional hardship to individuals is mere dust in the balance.

Alienability is an incident of property, but there are exceptions to the rule grounded on public policy—witness pensions, for instance, and half-pay and separate estate. We do not wish to see valour in rags or a too tender wife kissed or kicked out of her property. Alimony is another instance of inalienability—has long been so—but is maintenance? That was the question for the Court of Appeal in *Watkins* v. *Watkins* (65 L. J. P. 75, C. A.). There is this difference between alimony and maintenance, that where alimony is given the parties, though divorced from bed and board, are still man and wife; in the case of maintenance the marriage is dissolved, they are thenceforth strangers to one another. But this difference does not go deep. The real reason for inalienability seems to be found in the nature of the marriage institution. Marriage is more than an ordinary contract. It is a matter of public concern, a peculiarity evinced among other things by this, that it cannot be dissolved by consent. The Court has to be invoked, and when invoked it grants relief on terms, and these are such as will best secure to the estranged spouses, to the wife in particular who suffers most, respectability as a member of society and an independence equivalent in a way to what she would have enjoyed had the marital obligation to supply her with necessaries continued. For though love, honour, and obedience have gone, citizenship remains. This is the policy of the law, and alienability of the provision designed by the Court would defeat it as much in the case of maintenance as alimony.

The zeal of the reformer and his indiscretion are proverbial; and the Legislature is not exempt. Nearly twenty years ago in *In re*

Ford and Hill (10 Ch. Div. 365, 370), James L.J., protesting against 'new-fangled requisitions,' spoke of the 'expense and delay in the investigation of titles' as already 'almost a disgrace to the law of the country.' Two years afterwards the Conveyancing and Law of Property Act was passed, with a view of cheapening conveyancing, and curtailing its diffuser graces, and the policy of that very drastic measure was to accomplish its object by throwing all the costs of conveyancing obstruction—what may be called vexatious requisitions—on the purchaser. The vendor was (and is) still to supply a complete and proper abstract of title for the statutory period, but when it came to verifying it the purchaser was to pay for everything which the vendor did not happen to have in his possession. In *In re Stuart and Olivant and Seadon's Contract* ('96, 2 Ch. 328, 65 L. J. Ch. 576, C. A.) we get the latest result of this policy, and it is certainly startling. A vendor says in his conditions, 'My title is to commence with a certain lease.' The purchaser looks into the abstract and says, 'I want to see this root of title of yours—this lease. Where can I inspect it?' 'Oh!' says the vendor carelessly, 'I don't know where it is. If you want to see it you must find out at your own expense. You can have an attested copy on completion. Section 3 (6) of the Conveyancing Act protects me:' and the Court of Appeal was constrained to admit that it did. Most people will agree with Lindley L.J. that the Legislature has 'gone a little too far' here.

Insurance law grows apace. It is a prudential if a speculative age. Even the man in the street appreciates the advantages of eliminating chance from his calculations, of covering every risk, whether it is the risk of getting a company's capital subscribed, of having his spoons and forks burgled, his licence refused, or of slipping on a piece of orange peel. Accident insurance seems especially to come home in these days to men's bosoms, and as a consequence not only law but metaphysics has been enriched with discussions on what is an accident and the nice discrimination of the Aristotelian causes. The question in *Stokell* v. *Heywood* (65 L. J. Ch. 721) was not so deep. It was only whether the contract contained in an accident policy is an annual contract or whether it is like the contract in a policy of life insurance. This has not merely an academic but a practical interest, as *Stokell* v. *Heywood* shows. Thus *X* begins by taking out an accident policy. Then he executes a creditor's deed in terms covering the benefit of the policy, then he pays the next annual premium, and lastly he meets with his accident. To whom do the policy moneys belong? The trustee of the creditor's deed argued that he ought to have them, but the

Court said 'No.' The contract when the second premium was paid was a new contract and outside the security. The policy in such cases is not reissued, but the new contract is defined by reference to the terms of the original policy.

Trustees are still making the law—at their own expense—for the benefit of the public, still unable to live up to the great exemplar of the Chancery Courts. Someone, if we remember right, once wrote a history of Lord Macaulay's schoolboy, showing how that phenomenon came by his portentous knowledge. An interesting biography might similarly be written of the ideal trustee—the ordinary 'prudent man of business'—showing how that bundle of wisdom and virtues came to his present perfection. As a commercial character we are of course not surprised to hear that this paragon is careful to distinguish between the 'outside' broker and the 'inside' broker, and is aware, to use Stirling J.'s phrase, that the former does not 'enjoy so high a reputation as a member of the Stock Exchange.' We concede him so much knowledge of the seamy side as perhaps elementary in the City, but he is also possessed, we now know, of an intimate knowledge of the routine of business in general and stockbroker's business in particular. Here it was that the trustee in *Robinson* v. *Harkin* ('96, 2 Ch. 415, 65 L. J. Ch. 773) failed to come up to the requisite standard. He had £2,700 to invest, and he told his broker to buy stocks, but instead of waiting for the bought and sold note he handed over the cheque at once to the broker. The sight of the means to do ill deeds makes ill deeds done, and so it proved here. If the trustee had only kept to the routine of business the broker's delinquencies would not have signified. Unfortunately for him he did not. As Blackstone remarks of the formal and orderly parts of deeds, they have been well considered and settled by the wisdom of successive ages, and it is not prudent to depart from them without good reason or urgent necessity; so have the forms of business (stockbroking included) been settled by usage, and it is not prudent to depart from *them* without good reason or urgent necessity. The law cannot well require less than this of those who are entrusted with the management of other people's money, but the average trustee had better realize before it is too late that this ideal trustee whom courts of equity are so fond of parading, and whom he has to live up to, is something by no means 'ordinary.' The Common Law does not require 'consummate care,' except when one is dealing with dangerous instruments, such as fire-arms. Perhaps wills and settlements are dangerous instruments in the eye of a court of

equity. That wills, especially the amateur will, are often so in fact has been many times proved by experience.

A dog is in popular phrase allowed his first bite. He must not it is true bite a sheep or a cow at all, but that is only because he is limited by special legislation (28 & 29 Vict. c. 60), dispensing with proof of the scienter in such a case—a sheep being a special frailty. To make up for this deprivation a dog may now it seems bite a goat without losing his character (*Osborne* v. *Chocqueel*, '96, 2 Q. B. 109, 65 L. J. Q. B. 534), and if a goat why not a horse, a pig or a dog? 'Man superior walks,' and in his case the dog must be satisfied with his first bite.

The curious assumption in *Osborne* v. *Chocqueel* is that the dog must be 'accustomed to bite mankind,' but there are plenty of old cases where the declaration laid was that the dog was accustomed to bite animals. Thus we have '*ad mordendum oves consuetum*,' and again the choice declaration that the defendant kept a mastiff '*sciens* that he was *assuetum ad mordendum porcos*, which mastiff bit the plaintiff's sow great with pig, so as she died of the biting.' Really what the law regards is temper, evidence of savageness. If a dog will bite a goat surely that ought to put his owner on his guard as to his biting propensities. Somewhat oddly Lord Russell, while enlarging the dog's charter in *Osborne* v. *Chocqueel*, is for abolishing the scienter doctrine altogether, and so putting men in as good a position as sheep under the Act of 1865. This is a bold dictum. A good many dogs are undeniably unworthy of the privileges the law allows them, but so are men. An honest dog would be sadly humiliated at being branded *ferae naturae*, and to the dog owner such a doctrine would be highly oppressive.

Persons who make a profession of seeking out unclaimed funds are doubtless entitled to a reasonable commission from their clients. But they will have to learn from the wholesome judgment of Romer J. in *Rees* v. *De Bernardy* ('96, 2 Ch. 437, 65 L. J. Ch. 656) that it is not a safe way of doing business, with clients who are ignorant and helpless, to cry halves before giving any real information. The law of champerty is perhaps not very lucidly stated in the old books, but our ancestors were no fools when they made it. Maintenance, though generally discouraged, is venial in the eye of our law as compared with champerty, and may even be meritorious if it proceeds from the desire to help a kinsman to his just rights, or charity to a servant or poor neighbour; but no blood relationship or even collateral interest will redeem champerty, which involves besides the vices of maintenance, a kind of corrupt and often unconscionable bargain. The defendant in this case tried

to disguise his transaction as merely giving information, but the truth peeped out when the Mrs. Cluppins of this legal romance gave her view of the bargain as 'one half for the trouble of getting.' That is exactly what the law disallows.

What are the turnings and doublings of the hare to those of a married woman with a pack of creditors after her? Now it is no property and no contractual capacity, now restraint on anticipation, now acting as agent of her husband. The married woman in *In re Dagnall* (40 Sol. J. 731) struck out a new line which certainly exhibited genius of a high order. She had carried on business separately from her husband. She had contracted debts. She could not pay her debts. So to solve her difficulties she simply dropped her business and then she said, 'Now I am not a married woman carrying on business within the meaning of the Married Women's Property Act, 1882. I did carry it on once, but I don't now, and I can't be made a bankrupt.' It would have been unfortunate if this simple device had been allowed to defeat the Act, but the reasoning which the Court used to dislodge the lady from her position, viz. that a trader must be deemed to be carrying on a business so long as any debts incurred in it remain unpaid, is certainly artificial. The doctrine at all events has twice been disclaimed by the Court of Appeal under the Bankruptcy Act, 1869, though it found favour under earlier Bankruptcy Acts, but in dealing with the provoking Protean evasions and subterfuges of the married woman perhaps the Court contracts a little of her unscrupulousness. She must really elect soon whether she will take the benefits and burdens of independence or of dependence. She cannot have both much longer.

In July Prof. Liebermann read a paper before the Royal Academy of Sciences in Berlin, which is quite a dramatic example of the importance of minute critical work in correcting historical generalities. It was the common opinion—and borne out by the ultimate authorities in their current form—that trial by ordeal was unknown in England before the Danish period. But now comes Prof. Liebermann and produces passages from the dooms of Ine which have been supposed to relate to buying and selling (the common word *ceap*), though no satisfactory sense could be obtained; whereas the true reading of the MSS. turns out to be the less common word *ceac*, a cauldron or kettle, and the subject-matter is the water ordeal. The word *ceap* actually occurs in the same sentence in one of the passages, so that the corruption was almost inevitable. What is most curious is that the reading *ceac*

was known to earlier editors, but its meaning was not perceived, and it was treated as a clerical error or dialectic variant (Sitzungsberichte der kgl. preuss. Akad. der Wissenschaften zu Berlin, xxxv. 829). The result is that the water ordeal, at all events, was familiar in Wessex in the days when it was a separate kingdom, and the notion of procedure by ordeal being a Frankish importation must be greatly modified if not wholly discarded.

The history of the duel is a subject by no means remote from legal antiquities; for the modern duel, founded on the point of honour, was long supposed to have been in some way derived from the regular judicial combat or *iudicium Dei*. But Mr. George Neilson showed some time ago in his excellent book 'Trial by Combat' that this will not hold for England. The persistence of the judicial form, which obviously has nothing to do with chivalry, knightly weapons, or the point of honour, down to quite modern times, is an advantage to the British historian. Now Dr. Georg von Below has exploded the legend (which apparently rested on a dictum of Montesquieu—a great man, but often hasty) for Germany likewise (Zur Entstehungsgeschichte des Duells, printed at Münster as an academic dissertation). This essay is in the nature of a supplement to another work which we have not seen. According to Dr. von Below the first appearance of the modern duel was in Spain in the latter part of the fifteenth century. Can there be any question of a Moorish element? At any rate the Germanic trial by battle stands clearly absolved of any share in the parentage of the lie seven times removed, and the other elaborate follies which one may read in Alciati and Saviolo.

The learned author of 'The Principles of Equity' points out a slip in our notice of the book which appeared in the July number (pp. 292, 293). Dr. Thomson is stated to advocate the establishment in London of a County Court 'dealing only with equity cases within the limit of £50.' This should have been £500, a cipher having dropped out in the press. The learned author also points out in justification of the title of the work, that while the *practice* is that of the County Court, the *principles* are those of both the High Court and the County Court.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

INTERNATIONAL LAW[1].

MY first words must be in acknowledgment of the honour done me, by inviting me to address you on this interesting occasion. You are a congress of lawyers of the United States met together to take counsel, in no narrow spirit, on questions affecting the interests of your profession; to consider necessary amendments in the law which experience and time develop; and to examine the current of judicial decision and of legislation, state and federal, and whither that current tends. I, on the other hand, come from the judicial bench of a distant land, and yet I do not feel that I am a stranger amongst you, nor do you, I think, regard me as a stranger. Though we represent political communities which differ widely in many respects, in the structure of their constitutions and otherwise, we yet have many things in common.

We speak the same language; we administer laws based on the same juridical conceptions; we are co-heirs in the rich traditions of political freedom long established, and, we enjoy in common a literature, the noblest and the purest the world has known—an accumulated store of centuries to which you, on your part, have made generous contribution. Beyond this, the unseen 'crimson thread' of kinship, stretching from the mother Islands to your great Continent, unites us, and reminds us always that we belong to the same, though a mixed, racial family. Indeed the spectacle which we, to-day, present is unique. We represent the great English-speaking communities—communities occupying a large space of the surface of the earth—made up of races wherein the blood of Celt and Saxon, of Dane and Norman, of Pict and Scot, are mingled and fused into an aggregate power held together by the nexus of a common speech—combining at once territorial dominion, political influence and intellectual force greater than history records in the case of any other people.

This consideration is prominent amongst those which suggest the theme on which I desire to address you—namely, International Law.

The English-speaking peoples, masters not alone of extended territory but also of a mighty commerce, the energy and enterprise

[1] An address delivered at the annual meeting of the American Bar Association held at Saratoga Springs, New York, on August 19, 1896.

of whose sons have made them the great travellers and colonizers of the world—have interests to safeguard in every quarter of it, and, therefore, in an especial manner it is important to them, that the rules which govern the relations of states *inter se* should be well understood and should rest on the solid bases of convenience, of justice and of reason. One other consideration has prompted the selection of my subject. I knew it was one which could not fail, even if imperfectly treated, to interest you. You regard with just pride the part which the judges and writers of the United States have played in the development of International Law. Story, Kent, Marshall, Wheaton, Dana, Woolsey, Halleck and Wharton, amongst others, compare not unfavourably with the workers of any age, in this province of jurisprudence.

International Law, then, is my subject. The necessities of my position restrict me to, at best, a cursory and perfunctory treatment of it.

I propose briefly to consider what is International Law; its sources, the standard—the ethical standard—to which it ought to conform, the characteristics of its modern tendencies and developments, and then to add some (I think) needful words on the question, lately so much discussed, of International Arbitration.

I call the rules which civilized nations have agreed shall bind them in their conduct *inter se* by the Benthamite title 'International Law.' And here, Mr. President, on the threshold of my subject I find an obstacle in my way. My right so to describe them is challenged. It is said by some that there is no International Law, that there is only a bundle, more or less confused, of rules to which nations more or less conform, but that International Law there is none. The late Sir James F. Stephen takes this view in his 'History of the Criminal Law of England,' and in the celebrated *Franconia* case (to which I shall hereafter have occasion to allude) the late Lord Coleridge speaks in the same sense. He says, 'Strictly speaking "International Law" is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a lawgiver and a tribunal capable of enforcing it and coercing its transgressors.' Indeed it may be said that with few exceptions the same note is sounded throughout the judgments in that case. These views, it will at once be seen, are based on the definition of law by Austin in his Province of Jurisprudence Determined, namely, that a law is the command of a superior who has coercive power to compel obedience and to punish disobedience. But this definition is too narrow; it relies too much on force as the governing idea. If the development of law is historically considered, it will be found to exclude that body of customary law which in early

stages of society precedes law which assumes, definitely, the character of positive command coupled with punitive sanctions. But even in societies in which the machinery exists for the making of law in the Austinian sense, rules or customs grow up which are laws in every real sense of the word, as for example, the law merchant. Under later developments of arbitrary power laws may be regarded as the command of a superior with a coercive power in Austin's sense: 'Quod placuit principi legis vigorem habet.' In stages later still, as government becomes more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on consent. Savigny, indeed, says of all law, that it is first developed by usage and popular faith, then by legislation, and always by internal silently operating powers, and not mainly by the arbitrary will of the lawgiver.

I claim then that the aggregate of the Rules to which nations have agreed to conform in their conduct towards one another are properly to be designated 'International Law.'

The celebrated author of Ecclesiastical Polity (the 'judicious' Hooker) speaking of the Austinians of his time says:—'They who are thus accustomed to speak apply the name of Law unto that only rule of working which superior authority imposeth, whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon whereby actions are framed, a law.' I think it cannot be doubted that this is nearer to the true and scientific meaning of law.

What then is International Law?

I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another.

Is this accurate and exhaustive? Is there any *a priori* rule of right or of reason or of morality which, apart from and independent of the consent of nations, is part of the law of nations? Is there a law which nature teaches, and which, by its own force, forms a component part of the law of nations? Was Grotius wrong when to International Law he applied the test *placuit-ne Gentibus*?

These were points somewhat in controversy between my learned friend, Mr. Carter, and myself before the Paris Tribunal of Arbitration in 1893, and I have recently received from him a friendly invitation again to approach them—this time in a judicial rather than in a forensic spirit. I have reconsidered the matter, and, after the best consideration which I can give to the subject, I stand by the proposition which in 1893 I sought to establish. That proposi-

tion was that International Law was neither more nor less than what civilized nations have agreed shall be binding on one another as International Law.

Appeals are made to the law of nature and the law of morals, sometimes as if they were the same things, sometimes as if they were different things, sometimes as if they were in themselves International Law, and sometimes as if they enshrined immutable principles which were to be deemed to be not only part of International Law, but, if I may so say, to have been pre-ordained. I do not stop to point out in detail how many different meanings have been given to these phrases—the law of nature and the law of morals. Hardly any two writers speak of them in the same sense. No doubt appeals to both are to be found scattered loosely here and there in the opinions of continental writers.

Let us examine them.

What is the law of nature?

Moralists tell us that for the individual man life is a struggle to overcome nature, and in early and, what we call natural or barbarous states of society, the arbitrary rule of force and not of abstract right or justice is the first to assert itself. In truth the initial difficulty is to fix what is meant by the law of nature. Gaius speaks of it as being the same thing as the *Jus Gentium* of the Romans, which, I need not remind you, is not the same thing as *Jus inter Gentes*. Ulpian speaks of the *Jus naturale* as that in which men and animals agree. Grotius uses the term as equivalent to the *Jus stricte dictum*, to be completed in the action of a good man or state by a higher morality, but suggesting the standard to which law ought to conform. Pufendorf in effect treats his view of the rules of abstract propriety, resting merely on unauthorized speculations, as constituting International Law, and acquiring no additional authority from the usage of nations; so that he cuts off much of what Grotius regards as law. Ortolan, in his Diplomatie de la Mer, cites with approval the following incisive passage from Bentham, speaking of so-called natural rights springing from so-called natural law:—

'Natural right is often employed in a sense opposed to law, as when it is said, for example, that law cannot be opposed to natural right, the word "right" is employed in a sense superior to law; a right is recognized which attacks law, upsets and annuls it. In this sense, which is antagonistic to law, the word "droit" is the greatest enemy of reason and the most terrible destroyer of governments.

'We cannot reason with fanatics armed with a natural right, which each one understands as he pleases, applies as it suits him, of which he will yield nothing, withdraw nothing, which is inflexible, at the same time that it is unintelligible, which is consecrated

in his eyes like a dogma, and which he cannot discard without a cry. Instead of examining laws by their results, instead of judging them to be good or bad, they consider them with regard to their relation to this so-called natural right. That is to say, they substitute for the reason of experience all the chimeras of their own imagination.'

Austin, also, in his work on Jurisprudence, already mentioned, and referring to Pufendorf and others of his school, says:—

'They have confounded positive international morality or the rules which actually obtain amongst civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they call the law of nature. Professor von Martens of Göttingen is actually the first of the writers on the law of nations who seized this distinction with a firm grasp: the first who has distinguished the rules which ought to be received in the intercourse of nations, or, which would be received if they conformed to an assumed standard of whatever kind, from those which *are* so received, endeavoured to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law.'

Finally Woolsey, speaking of this class of writers, says they commit the fault of failing to distinguish sufficiently between natural justice and the law of nations, of spinning the web of a system out of their own brain as if they were the legislators of the world, and of neglecting to inform us what the world actually holds the law to be by which nations regulate their conduct. So much for the law of nature.

What are we to say of the appeal to the law of morality?

It cannot be affirmed that there is a universally accepted standard of morality. Then what is to be the standard? The standard of what nation? The standard of what nation and in what age?

Human society is progressive—progressive let us hope to a higher, a purer, a more unselfish ethical standard. The Mosaic law enjoined the principle an eye for an eye, a tooth for a tooth. The Christian law enjoins that we love our enemies and that we do good to those who hate us. But more. Nations although progressing, let us believe, in the sense which I have indicated, do not progress *pari passu*. One instance occurs to me pertinent to the subject in hand.

Take the case of privateering. The United States is to-day the only great power which has not given its adhesion to the principle of the Declaration of Paris of 1856, for the abolition of

privateering. The other great nations of the earth have denounced privateering as immoral and as the cover and the fruitful occasion of piracy. I am not at all concerned to discuss in this connexion whether the United States were right or were wrong. It would not be pertinent to the point; but it is just to add that the assenting Powers had not scrupled to resort to privateering in past times, and also that the United States declared their willingness to abandon the practice if more complete immunity of private property in time of war were secured.

Nor do nations, even where they are agreed on the inhumanity and immorality of given practices, straightway proceed to condemn them as international crimes. Take as an example of this the Slave Trade. It is not too much to say that the civilized powers are abreast of one another in condemnation of the traffic in human beings as an unclean thing—abhorrent to all principles of humanity and morality, and yet they have not yet agreed to declare this offence against humanity and morality to be an offence against the law of nations. That it is not so has been affirmed by English and by American judges alike. Speaking of morality in connexion with International Law, Professor Westlake in his 'Principles of International Law' acutely observes that while the rules by which nations have agreed to regulate their conduct *inter se*, are alone properly to be considered International Law, these do not necessarily exhaust the ethical duties of states one to another, any more, indeed, than municipal law exhausts the ethical duties of man to man; and Dr. Whewell has remarked of jural laws in general that they are not (and perhaps it is not desirable that they should be) co-extensive with morality. He says the adjective *right* belongs to the domain of morality; the substantive *right* to the domain of law.

The truth is that civilized men have at all times been apt to recognize the existence of a law of morality, more or less vague and undefined, depending upon no human authority and supported by no human external sanction other than the approval and disapproval of their fellow-men, yet determining, largely, for all men and societies of men what is right and wrong in human conduct, and binding, as is sometimes said, *in foro conscientiae*. This law of morality is sometimes treated as synonymous with the natural law, but sometimes the natural law is regarded as having a wider sphere, including the whole law of morality. It cannot be said either of international law or of municipal law that they include the moral law, nor accurately or strictly that they are included within it. It is a truism to say that municipal law and international law ought not to offend against the law of morality.

They may adopt and incorporate particular precepts of the law of morality; and on the other hand, undoubtedly, that may be forbidden by the municipal or international law, which in itself is in no way contrary to the law of morality or of nature. But whilst the conception of the moral law or law of nature excludes all idea of dependence on human authority, it is of the essence of municipal law that its rules have been either enacted or in some way recognized as binding by the supreme authority of the state (whatever that authority may be), and so also is it of the essence of International Law that its rules have been recognized as binding by the nations constituting the community of civilized mankind.

We conclude then that, while the aim ought to be to raise high its ethical standard, International Law, as such, includes only so much of the law of morals or of right reason or of natural law (whatever these phrases may cover) as nations have agreed to regard as International Law.

In fine, International Law is but the sum of those rules which civilized mankind have agreed to hold as binding in the mutual relations of states. We do not, indeed, find all those rules recorded in clear language—there is no international code. We look for them in the long records of customary action; in settled precedents; in treaties affirming principles; in state documents; in declarations of nations in conclave—which draw to themselves the adhesion of other nations; in declarations of text-writers of authority generally accepted; and lastly, and with most precision, in the field which they cover, in the authoritative decisions of Prize Courts. I need hardly stop to point out the great work under the last head accomplished, amongst others, by Marshall and Story in these States, by Lord Stowell in England, and by Portalis in France.

From these sources we get the evidence which determines whether or not a particular canon of conduct, or a particular principle, has or has not received the express or implied assent of nations. But International Law is not as the twelve tables of ancient Rome. It is not a closed book. Mankind are not stationary. Gradual change and gradual growth of opinion are silently going on. Opinions, doctrines, usages, advocated by acute thinkers are making their way in the world of thought. They are not yet part of the law of nations. In truth, neither doctrines derived from what is called the law of nature (in any of its various meanings), nor philanthropic ideas, however just or humane, nor the opinion of text-writers, however eminent, nor the usages of individual states—none of these, nor all combined, constitute International Law.

If we depart from the solid ground I have indicated, we find ourselves amid the treacherous quicksands of metaphysical and ethical speculation: we are bewildered, particularly by the French writers in their love for *un système*, and perplexed by the obscure subtleties of writers like Hautefeuille with his *Loi primitive* and *Loi secondaire*. Indeed it may, in passing, be remarked that history records no case of a controversy between nations having been settled by abstract appeals to the laws of nature or of morals.

But while maintaining this position, I agree with Woolsey when he says that if International Law were not made up of rules for which reasons could be given, satisfactory to man's intellectual and moral nature, it would not deserve the name of a science. Happily those reasons can be given. Happily men and nations propose to themselves higher and still higher ethical standards. The ultimate aim in the actions of men and of communities ought, and I presume will be admitted, to be, to conform to the divine precept, 'Do unto others as you would that others should do unto you.'

I have said that the rules of International Law are not to be traced with the comparative distinctness with which municipal law may be ascertained—although even this is not always easy. I would not have it, however, understood that I should to-day advocate the codification of International Law. The attempt has been made, as you know, by Field in this country, and by Professor Bluntschli of Heidelberg, and by some Italian jurists, but has made little way towards success. Indeed, codification has a tendency to arrest progress. It has been so found, even where branches or heads of municipal law have been codified, and it will at once be seen how much less favourable a field for such an enterprise International Law presents, where so many questions are still indeterminate. After all it is to be remembered that jural law, in its widest sense, is as old as Society itself: *ubi societas ibi jus est*; but International Law, as we know it, is a modern invention. It is in a state of growth and transition. To codify it would be to crystallize it: uncodified it is more flexible and more easily assimilates new rules. While agreeing, therefore, that indeterminate points should be determined, and that we should aim at raising the ethical standard, I do not think we have yet reached the point at which codification is practicable, or if practicable would be a public good.

Let me give you an analogy. Amongst the most successful experiments in codification in English communities, have been those in Anglo-India, particularly the Penal Code and the Codes of Criminal and Civil Procedure. Prompted by their comparative

success, Sir Roland Wilson urged the extension of the process of codification to those traditional unwritten native usages, or customary law, of Hindu or Mahomedan origin, still recognized in the government of India by Englishmen. But the wiser opinion of Indian experts was that it was better not to persevere in the attempt. Many of these usages, by sheer force of contact with European life and habits of thought, are falling into desuetude. The hand of change is at work upon them, and to codify them would be to stop the natural progress of disintegration.

As we are not to-day considering the history of International Law, I shall say but a word as to its rise, and then pass on to the consideration of its later developments and tendencies.

Like all law, in the history of human societies, it begins with usage and custom, and unlike municipal law, it ends there. When, after the break-up of the Roman Empire, the surface of Europe was partitioned and fell under the rule of different sovereigns, the need was speedily felt for some guiding rule of international conduct. International Law was in a rudimentary stage; it spoke with ambiguous voice; it failed to cover the whole ground of doubtful action. It needed not only an interpreter of authority, but one who should play at once the part of mediator, arbiter and judge. The Christian religion has done much to soften and humanize the action of men and of nations, and the Papal head of Christendom became, after the disruption of the Roman Empire, the interpreter and almost the embodiment of International Law. The popes of the middle ages determined many a hot dispute between rival forces without loss of human life. Their decrees were widely accepted. Their action, however, at the best, could not adequately supply the place of a rule of conduct to which all might indifferently appeal. And when, later, with the Reformation movement, the time came when the pope could not command recognition as the religious head of a united Christendom, the necessity of the time quickened men's brains, and, under the fostering care of the jurists of many lands, there began to emerge a system which gave shape and form to ideas generally received and largely acted on by nations.

What Sir James Stephen has eloquently said of religion may truly be predicated of International Law. The jurists set to music the tune which was haunting millions of ears. It was caught up, here and there, and repeated till the chorus was thundered out by a body of singers able to drown all discords, and to force the vast unmusical mass to listen to them.

Although Hugo de Groote is regarded as the father and founder of International Law, he was preceded by two men born into the

world forty years before him, namely, Ayala (the Spanish Judge-Advocate with the army of the Prince of Parma) and Suarez (a Jesuit priest, also a Spaniard), both born in 1548, whose labours ought not to be forgotten.

Suarez in his De Legibus et Deo Legislatore, and Ayala in his De Jure et Officiis Bellicis et Disciplina Militari had done good work.

Suarez, from the point of view of the Catholic theologian, assumes that the principles of the moral law are capable of complete and authoritative definition, and are supported by the highest spiritual sanction. He therefore treats of the Lex Naturalis as a definite substantive law, sufficient and complete in its own sphere and binding on all men. But he regards International Law as a code of rules dealing with matters outside the sphere of the natural law:—matters not strictly right or wrong in themselves, but becoming so only by virtue of the precepts of the law which he considers to be founded upon the generally recognized usages of nations. In the following passage, which is interesting from the singular modernness of its spirit, he explains his view of the origin of International Law:—

'The foundation of the law of nations lies in this, that the human race, though divided into various peoples and kingdoms, has always a certain unity, which is not merely the unity of species, but is also political and moral; as is shown by the natural precept of mutual love and pity, which extends to all peoples, however foreign they may be to one another, and whatever may be their character or constitution. From which it follows that although any state, whether a republic or a kingdom, may be a community complete in itself, it is nevertheless a member of that whole which constitutes the human race; for such a community is never so completely self-sufficing but that it requires some mutual help and intercourse with others, sometimes for the sake of some benefit to be obtained, but sometimes too, from the moral necessity and craving which are apparent from the very habits of mankind.

'On this account, therefore, a law is required by which states may be rightly directed and regulated in this kind of intercourse with one another. And although to a great extent this may be supplied by the natural law, still not adequately nor directly, and so it has come about that the usages of states have themselves led to the establishment of special rules. For, just as within an individual state custom gives rise to law, so, for the human race as a whole, usages have led to the growth of the laws of nations; and this the more easily, inasmuch as the matters with which such law deals are few and are closely connected with the law of nature from which they may be deduced by inferences, which though not strictly necessary, so as to constitute laws of absolute moral obliga-

tion, still are very conformable and agreeable to nature, and therefore readily accepted by all.'

Nor ought we to overlook the work of a writer even earlier than these. I mean Franciscus à Victoria. Hall says of him that his writings in 1533 mark an era in the history of International ethics. Spain claimed, largely by virtue of papal grant and warrant, to acquire the territory and the mastery of the semi-civilized races of America. He denied the validity of the papal title; he maintained the sovereign rights of the aboriginal races, and he claimed to place international relations upon the basis of equal rights as between communities in actual possession of independence. In other words, he, first, clearly affirmed the juridical principle of the complete international equality of independent states, however disproportionate their power.

Grotius undoubtedly had had the field of international relations explored by these, amongst other writers, who had preceded him, but to him is certainly due the credit of evolving in his De Jure Belli ac Pacis a coherent system of law for the aggregation of states.

But I turn from this interesting line of thought, to consider, first, the part played by the United States in shaping the modern tendencies of International Law, and, next, whither those tendencies run. I have already spoken of the International writers of whom you are justly proud. It is not too much to say that the undoubted stream of tendency in modern International Law to mitigate the horrors of war, to humanize or to make less inhuman its methods, and to narrow the area of its consequential evils, is largely due to the policy of your statesmen, and the moral influence of your jurists.

The reason why you thus early in your young history as an independent power took so leading and noble a part in the domain of International Law is not far to seek;—it is at once obvious and interesting.

In the first place, you were born late, in the life of the world, into the family of nations. The common law of England you had indeed imported and adopted as colonists in the Eastern States, but subject as you then were to the mother country, you had no direct interest or voice in international relations, which were entirely within the domain of the Sovereign power. But when you asserted your independence, the laws of the family of nations, of which you then became a member, were bound up with and became in part the justification for your existence as a sovereign power, and assumed for you importance and pre-eminence beyond the common

law itself. Further, your remoteness from the conflicts of European powers and the wisdom of your rulers in devoting their energies to the consolidation and development of home-affairs, gave to your people a special concern in that side of International Law which affects the interests, rights and obligations of neutrals; and thus, it has come to pass that your writers have left their enduring mark on the law of nations touching allegiance, nationality, naturalization and neutrality, although as to these there are points which still remain indeterminate.

It is substantially true to say that while to earlier writers is mainly due the formulation of rules relating to a state of war, to the United States—to its judges, writers and statesmen, we largely owe the existing rules which relate to a state of peace, and which affect the rights and obligations of powers, which, during a state of war, are themselves at peace.

On the other hand, while in Great Britain, writers of great distinction on International Law are not wanting, and while the judges of her Prize Courts have done a great work in systematizing and justifying on sound principles the law of capture and prize, it is true to say that British lawyers did not apply themselves, early, or with great zeal, to the consideration of International Jurisprudence.

Nor, again, is the reason far to seek. Great Britain had existed for centuries before International Law, in the modern sense, came into being. The main body of the English Law was complete. The common law, springing from many sources, had assumed definite and comprehensive proportions. It sufficed for the needs of the time. Neither English statesmen nor English lawyers experienced the necessity which was strongly felt on the Continent of Europe—the constant theatre of war—for the authorized formulation of rules of international conduct.

The need for these was slowly forced upon England, and, it is hardly too much to say that, to the British Admiral, accustomed to lord it on the high seas, International Law at first came, not as a blessing and an aid, but as a perplexing embarrassment.

Notwithstanding all this, there is a marked agreement between English and American writers as to the manner in which International Law is treated. They belong to the same school—a school distinctly different from that of writers on the Continent of Europe. The essential difference consists in this:—whereas in the latter, what I shall call the ethical and metaphysical treatment is followed, in the former, while not ignoring the important part which ethics play in the consideration of what International Law ought to be, its writers for the most part carefully distinguish between what is,

in fact, International Law from their views of what the law ought to be. Their treatment is mainly historical.

By most continental writers, and by none more than Hautefeuille, what is, and what he thinks ought to be law, theory and fact, law and so-called rules of nature and of right, are mixed up in a way at once confusing and misleading.

One distinguished English writer indeed, the late Sir Henry Maine, thought that he had discovered a fundamental difference between English and American jurists as to the view taken of the obligation of International Law.

His opinion was based on the judgments of the English judges in the celebrated *Franconia* case, in which it was held that the English Courts had no jurisdiction to try a foreigner for a crime committed on the high seas but within a marine league from the British coast. The case was decided in 1876 and is reported in the second volume of the Law Reports, Exchequer Division, p. 63. The facts were these :— The defendant was Captain Keyn, a German subject, in charge as Captain of the German Steamship *Franconia*. When off Dover the *Franconia*, at a point within two and a half miles of the beach, ran into and sank a British steamer, *Strathclyde*, thereby causing loss of life. The facts were such as to constitute, according to English law, the crime of manslaughter, of which the defendant was found guilty by the jury, but the learned judge who tried the case at the Central Criminal Court reserved, for further consideration by the Court for Crown Cases Reserved, the question whether the Central Criminal Court had jurisdiction over the defendant, a foreigner, in respect of an offence committed by him on the high seas, but within a marine league of the shore. All the members of the Court were of opinion that the chief Criminal Courts, that is to say, the Courts of Assize and the Central Criminal Court, were clothed with jurisdiction to administer justice in the bodies of counties, or, in other words, in English territory; and that from the time of Henry the Eighth a Court of Special Commissioners, and, later, the Central Criminal Court (in which the defendant had been tried) had been invested by statute with the jurisdiction previously exercised by the Lord High Admiral on the high seas. But the majority held that the marine league belt was not part of the territory of England, and therefore not within the bodies of counties, and also that the Admiral had had no jurisdiction over foreigners on the high seas. The minority, on the other hand, held that the marine belt was part of the territory of England, and that the Admiral had had jurisdiction over foreigners within those limits.

While I do not say that I should have arrived at the conclusions

of historical fact of the majority, I am by no means clear that the judges of the United States, accepting the same data as did the majority of the English judges, would not have decided in the same way. But however this may be, the views of the majority do not seem to me to warrant the assumption of Sir Henry Maine that the case fundamentally affects the view taken of the authority of International Law.

What it does incidentally reveal is a constitutional difference between the United States and Great Britain as to the methods by which the Municipal Courts acquire, at least in certain cases, jurisdiction to try and to punish offences against International Law.

An example of that difference is ready to hand. Improved and stricter views of neutral duties constitute one of the great developments of this century.

These views were (for reasons to which I have already adverted) adopted earlier and more fully in the United States than in England. What was thereupon the action of the Executive? No sooner had Washington, as President, and Jefferson, as Secretary of State, promulgated the rules of neutrality by which they intended to be guided, than they caused Gideon Henfield, an American citizen, to be tried for taking service on board a French privateer, as being a criminal act, because in contravention of those rules. Political feeling procured an acquittal, in spite of the judge's direction.

Later, no doubt, Congress passed the Act of 1794, making such conduct criminal, not (as I gather), because it was admitted to be necessary, but simply to strengthen the hands of the Executive.

I can hardly doubt how the same case would have been dealt with in England.

Assuming the doing of the acts forbidden by proclamation of neutrality, although infractions of International Law, not to be misdemeanours by common law, and not to have been made offences by municipal statute, the judges (I cannot doubt) would have said the act was yesterday legal, or at least not illegal, and that, municipal law not having declared it a crime, they could not so declare it. According to the law of England a proclamation by the Executive, in however solemn form, has no legislative force unless an Act of Parliament has so enacted. Parliament has in fact so enacted as to Orders of the Queen in Council in many cases. But assuming the law to be as I have stated, it points to no failure in England to recognize the full obligation of International Law as between states. For, notwithstanding isolated expressions of opinion uttered in times of excitement, it will not to-day be doubted that it is the duty of states to give effect to the obligations of

International Law by municipal legislation, where that is necessary, and to use reasonable efforts to secure the observance of that law.

In England we have an old Constitution under which we are accustomed to fixed modes of legislation, and when at last we accept a new development of International Law, we look to those methods to give effect to it. Indeed, that habit of looking to legislation to meet new needs and developments, even in internal concerns, a habit confirmed and strengthened in the current century, has done much to restrain the judges from that bold expansion of principle to meet new cases, which, when legislation was less active, marked judicial utterances.

On the other hand, with you things are materially different. Your Constitution is still so modern that equally fixed habits of looking to legislation have not had time to grow up. Meanwhile, that modern Constitution is from time to time assailed by still more modern necessities, and the methods for its amendment are not swift or easy. The structure has not become completely ossified. Hence has arisen what I may call a flexibility of interpretation, applied to the Constitution of the United States, for which I know no parallel in English judicature, and which seems to me to exceed the latitude of interpretation observed by your judges in relation to Acts of Congress. I refer, as examples, to the emancipation of the slaves by President Lincoln during the Civil War, which was justified as an act covered by the necessities of the case and within the 'war power' conferred on the Executive by the Constitution; and, also, to the judicial declaration by the Supreme Court, of the validity of the Act of Congress making Greenbacks legal tender, on the ground that certain express powers, as to currency, being vested in Congress by the Constitution, the power of giving forced circulation to paper flowed from them as a desirable, if not a necessary, implication. With us no such difficulties arise. Our Constitution is unwritten, and the Legislature is omnipotent. With you the Constitution is written, and the judicial power interprets it, and may declare the highest Act of Congress null and void as unconstitutional. With us there can, in the strict sense of the words, be no such thing as an unconstitutional Act of Parliament.

I turn now to the consideration of what characterizes the later tendencies of International Law. In a word it is their greater humanity.

When Menelik, Emperor of Abyssinia, was recently reported to have cut off the right arms and feet of 500 prisoners, the civilized world felt a thrill of horror. Yet the time was when to treat prisoners as slaves and permanently to disable them from again

bearing arms, were regarded as common incidents of belligerent capture. Such acts would once have excited no more indignation than did the inhumanities of the African slave trade before the days of Clarkson and Wilberforce.

Let us hope that it is no longer possible to do as Louis XIV did in his devastation of the Palatinate, or to do as he threatened to do—break down the dykes and overwhelm with disaster the Low Countries. Let us hope, too, that no modern Napoleon would dare to decree as the first Napoleon did in his famous or infamous *seront brûlées* edict of 1810. The force of public opinion is too strong and it has reached a higher moral plane.

A bare recital of some of the important respects in which the evils of war have been mitigated by more humane customs must suffice.

Amongst them are: (1) the greater immunity from attack of the persons and property of enemy-subjects in a hostile country; (2) the restrictions imposed on the active operations of a belligerent when occupying an enemy's country; (3) the recognized distinction between subjects of the enemy, combatant and non-combatant; (4) the deference accorded to cartels, safe conducts and flags of truce; (5) the protection secured for ambulances and hospitals and for all engaged in tending the sick and wounded—of which the Geneva Red Cross Convention of 1864 is a notable illustration; (6) the condemnation of the use of instruments of warfare which cause needless suffering.

In this field of humane work the United States took a prominent part. When the Civil War broke out President Lincoln was prompt in entrusting to Professor Franz Lieber the duty of preparing a manual of systematized rules for the conduct of forces in the field—rules aimed at the prevention of those scenes of cruelty and rapine which were formerly a disgrace to humanity. That manual has, I believe, been utilized by the Governments of England, France and Germany.

Even more important are the changes wrought in the position of neutrals in war times; who, while bound by strict obligations of neutrality, are in great measure left free and unrestricted in the pursuit of peaceful trade.

But in spite of all this who can say that these times breathe the spirit of peace? There is war in the air. Nations armed to the teeth prate of peace; but there is no sense of peace. One sovereign burthens the industry of his people to maintain military and naval armament at war strength, and his neighbour does the like and justifies it by the example of the other; and England, insular though she be, with her Imperial interests scattered the world over,

follows, or is forced to follow, in the wake. If there be no war, there is at best an armed peace.

Figures are appalling. I take those for 1895. In Austria the annual cost of Army and Navy was, in round figures, £18,000,000 sterling; in France, £37,000,000; in Germany, £27,000,000; in Great Britain, £36,000,000; in Italy, £13,000,000; and in Russia, £52,000,000.

The significance of these figures is increased if we compare them with those of former times. The normal cost of the armaments of war has of late years enormously increased. The annual interest on the public debt of the Great Powers is a war tax. Behind this array of facts stands a tragic figure. It tells a dismal tale. It speaks of over-burthened industries, of a waste of human energy unprofitably engaged, of the squandering of treasure which might have let light into many lives, of homes made desolate, and all this, too often, without recompense in the thought that these sacrifices have been made for the love of country or to preserve national honour, or for national safety. When will governments learn the lesson that wisdom and justice in policy are a stronger security than weight of armament?

> 'Ah! when shall all men's good
> Be each man's rule, and universal peace
> Lie, like a shaft of light, across the land?'

It is no wonder that men—earnest men—enthusiasts if you like, impressed with the evils of war, have dreamt the dream that the millennium of peace might be reached by establishing a universal system of international arbitration.

The cry for peace is an old-world cry. It has echoed through all the ages, and arbitration has long been regarded as the handmaiden of peace. Arbitration has, indeed, a venerable history of its own. According to Thucydides, the historian of the Peloponnesian War, Archidamus, King of Sparta, declared that 'it was unlawful to attack an enemy who offered to answer for his acts before a tribunal of arbiters.'

The fifty years' treaty of alliance between Argos and Lacedaemon contained a clause to the effect that if any difference should arise between the contracting parties, they should have recourse to the arbitration of a neutral power, in accordance with the custom of their ancestors. These views of enlightened Paganism have been reinforced in Christian times. The Roman Emperors for a time, and afterwards in fuller measure the Popes (as we have seen), by their arbitrament often preserved the peace of the old world, and prevented the sacrifice of blood and treasure. But from time to time, and more fiercely when the influence of the head of

Christendom lessened, the passions of men broke out, the lust for dominion asserted itself, and many parts of Europe became so many fields of Golgotha. In our own times the desire has spread and grown strong for peaceful methods for the settlement of international disputes. The reason lies on the surface. Men and nations are more enlightened; the grievous burthen of military armaments is sorely felt; and in these days when, broadly speaking, the people are enthroned, their views find free and forcible expression in a world-wide Press. The movement has been taken up by societies of thoughtful and learned men in many places. The *Bureau International de la Paix* records the fact that some ninety-four voluntary Peace Associations exist, of which some forty are in Europe, and fifty-four in America. Several Congresses have been held in Europe to enforce the same object, and in 1873 there was established at Ghent the *Institut du Droit International*, the declared object of which is to put International Law on a scientific footing, to discuss and clear up moot points, and to substitute a system of rules conformable to right for the blind chances of force and the lavish expenditure of human life.

In 1873 also the Association for the Reform and Codification of the Law of Nations was formed, and it is to-day pursuing active propaganda under the name of the International Law Association, which it adopted in 1894. It also has published a report affirming the need of a system of international arbitration.

In 1888 a Congress of Spanish and American Jurists was held at Lisbon, at which it was resolved that it was indispensable that a tribunal of arbitration should be constituted with a view to avoid the necessity of war between nations.

But more hopeful still, the movement has spread to legislative representative bodies. As far back as 1833 the Senate of Massachusetts proclaimed the necessity for some peaceful means of reconciling international differences, and affirmed the expediency of establishing a court of nations.

In 1890 the Senate and House of Representatives of the United States adopted a concurrent resolution, requesting the President to make use of any fit occasion to enter into negotiations with other Governments, to the end that any difference or dispute, which could not be adjusted by diplomatic agency, might be referred to arbitration, and peacefully adjusted by such means.

The British House of Commons in 1893 responded by passing unanimously a resolution expressive of the satisfaction it felt with the action of Congress, and of the hope that the Government of the Queen would lend its ready co-operation to give effect to it. President Cleveland officially communicated this last resolution to

Congress, and expressed his gratification that the sentiments of two great and kindred nations were thus authoritatively manifested in favour of the national and peaceable settlement of international quarrels by recourse to honourable arbitration. The Parliaments of Denmark, Norway and Switzerland, and the French Chamber of Deputies have followed suit.

It seemed eminently desirable that there should be some agency, by which members of the great representative and legislative bodies of the world, interested in this far-reaching question, should meet on a common ground and discuss the basis for common action.

With this object there has recently been founded 'The Permanent Parliamentary Committee in favour of Arbitration and Peace,' or, as it is sometimes called, 'The Inter-Parliamentary Union.' This Union has a permanent organization—its office is at Berne. Its members are not vain idealists. They are men of the world. They do not claim to be regenerators of mankind, nor do they promise the millennium, but they are doing honest and useful work in making straighter and less difficult the path of intelligent progress. Their first formal meeting was held in Paris in 1889 under the Presidency of the late M. Jules Simon; their second in 1890 in London under the Presidency of Lord Herschell, ex-Lord Chancellor of Great Britain; their third in 1891 at Rome under the Presidency of Signor Bianchieri; their fourth in 1892 at Berne under the Presidency of M. Droz; their fifth in 1894 at the Hague under the Presidency of M. Rohnsen; their sixth in 1895 at Brussels under the Presidency of M. Descamps; and their seventh will, it is arranged, be held this year at Buda-Pest. Speaking in this place I need only refer, in passing, to the remarkable Pan-American Congress held in your States in 1890 at the instance of the late Mr. Blaine, directed to the same peaceful object.

It is obvious, therefore, that the sentiment for peace and in favour of arbitration as the alternative for war is growing apace. How has that sentiment told on the direct action of nations? How far have they shaped their policy according to its methods? The answers to these questions are also hopeful and encouraging.

Experience has shown that, over a large area, international differences may honourably, practically, and usefully be dealt with by peaceful arbitrament. There have been since 1815 some sixty instances of effective International Arbitration. To thirty-two of these the United States have been a party, and Great Britain to some twenty of them.

There are many instances also of the introduction of arbitration clauses into treaties. Here again the United States appear in the

van. Amongst the first of such treaties—if not the very first—is the Guadaloupe-Hidalgo Treaty of 1848 between America and Mexico. Since that date many other countries have followed this example. In the year 1873 Signor Mancini recommended that, in all treaties to which Italy was a party, such a clause should be introduced. Since the Treaty of Washington, such clauses have been constantly inserted in Commercial, Postal, and Consular Conventions. They are to be found also in the delimitation treaties of Portugal with Great Britain and with the Congo Free State made in 1891. In 1895 the Belgian Senate, in a single day, approved of four treaties with similar clauses, namely, treaties concluded with Denmark, Greece, Norway, and Sweden.

There remains to be mentioned a class of treaties in which the principle of arbitration has obtained a still wider acceptance. The treaties of 1888 between Switzerland and San Salvador, of 1888 between Switzerland and Ecuador, of 1888 between Switzerland and the French Republic, and of 1894 between Spain and Honduras, respectively contain an agreement to refer all questions in difference, without exception, to arbitration. Belgium has similar treaties with Venezuela, with the Orange Free State, and with Hawaii.

These facts, dull as is the recital of them, are full of interest and hope for the future.

But are we thence to conclude that the millennium of peace has arrived—that the dove has returned to the ark, sure sign that the waters of international strife have permanently subsided?

I am not sanguine enough to lay this flattering unction to my soul. Unbridled ambition—thirst for wide dominion—pride of power still hold sway, although I believe with lessened force and in some sort under the restraint of the healthier opinion of the world.

But further, friend as I am of peace, I would yet affirm that there may be even greater calamities than war—the dishonour of a nation, the triumph of an unrighteous cause, the perpetuation of hopeless and debasing tyranny:

> 'War is honourable
> In those who do their native rights maintain,
> In those whose swords an iron barrier are
> Between the lawless spoiler and the weak;
> But is, in those who draw th' offensive blade
> For added power or gain, sordid and despicable.'

It behoves, then, all who are friends of peace and advocates of arbitration, to recognize the difficulties of the question, to examine and meet these difficulties, and to discriminate between the cases

in which friendly arbitration is, and in which it may not be, practically, possible.

Pursuing this line of thought, the shortcomings of International Law reveal themselves to us and demonstrate the grave difficulties of the position.

The analogy between arbitration as to matters in difference between individuals, and to matters in difference between nations, carries us but a short way.

In private litigation the agreement to refer is either enforceable as a rule of Court, or, where this is not so, the award gives to the successful litigant a substantive cause of action. In either case there is behind the arbitrator the power of the judge to decree, and the power of the Executive to compel compliance with, the behest of the arbitrator. There exist elaborate rules of Court and provisions of the Legislature governing the practice of arbitrations. In fine, such arbitration is a mode of litigation by consent, governed by law, starting from familiar rules, and carrying the full sanction of judicial decision. International arbitration has none of these characteristics. It is a cardinal principle of the law of nations that each sovereign power, however politically weak, is internationally equal to any other political power, however politically strong. There are no rules of International Law relating to arbitration, and of the law itself there is no authoritative exponent, nor any recognized authority for its enforcement.

But there are differences to which, even as between individuals, arbitration is inapplicable—subjects which find their counterpart in the affairs of nations. Men do not arbitrate where character is at stake, nor will any self-respecting nation readily arbitrate on questions touching its national independence or affecting its honour.

Again, a nation may agree to arbitrate and then repudiate its agreement. Who is to coerce it? Or, having gone to arbitration and been worsted, it may decline to be bound by the award. Who is to compel it?

These considerations seem to me to justify two conclusions:—The first is that arbitration will not cover the whole field of international controversy, and the second that unless and until the great powers of the world, in league, bind themselves to coerce a recalcitrant member of the family of nations, we have still to face the more than possible disregard by powerful states of the obligations of good faith and of justice. The scheme of such a combination has been advocated, but the signs of its accomplishment are absent. We have, as yet, no league of nations of the Amphictyonic type.

Are we then to conclude that force is still the only power that

rules the world? Must we then say that the sphere of arbitration is a narrow and contracted one?

By no means. The sanctions which restrain the wrongdoer—the breaker of public faith—the disturber of the peace of the world, are not weak, and, year by year, they wax stronger. They are the dread of war, and the reprobation of mankind. Public opinion is a force which makes itself felt in every corner and cranny of the world, and is most powerful in the communities most civilized. In the public Press, and in the Telegraph, it possesses agents by which its power is concentrated, and speedily brought to bear where there is any public wrong to be exposed and reprobated. It year by year gathers strength as general enlightenment extends its empire, and a higher moral altitude is attained by mankind. It has no ships of war upon the seas or armies in the field, and yet great potentates tremble before it, and humbly bow to its rule.

Again, trade and travel are great pacificators. The more nations know of one another, the more trade relations are established between them, the more goodwill and mutual interest grow up; and these are powerful agents working for peace.

But although I have indicated certain classes of questions on which sovereign powers may be unwilling to arbitrate, I am glad to think that these are not the questions which most commonly lead to war. It is hardly too much to say that arbitration may fitly be applied in the case of by far the largest number of questions which lead to international differences. Broadly stated, (1) wherever the right in dispute will be determined by the ascertainment of the true facts of the case; (2) where, the facts being ascertained, the right depends on the application of the proper principles of International Law to the given facts, and (3) where the dispute is one which may properly be adjusted on a give and take principle with due provision for equitable compensation as in cases of delimitation of territory and the like: in all such cases, the matter is one which ought to be arbitrated, and can be satisfactorily dealt with by arbitration.

The question next arises, What ought to be the constitution of the tribunal of arbitration? Is it to be a tribunal *ad hoc*, or is it to be a permanent international tribunal?

It may be enough to say, that at this stage, the question of the constitution of a permanent tribunal is not ripe for practical discussion, nor will it be until the majority of the great powers have given in their adhesion to the principle. But whatever may be said for vesting the authority in such powers to select the arbitrators, from time to time, as occasion may arise, I doubt whether in any case a permanent tribunal, the members of which

shall be *a priori* designated, is practicable or desirable. In the first place the character of the best tribunal must largely depend upon the question to be arbitrated. But apart from this, I gravely doubt the wisdom of giving that character of permanence to the *personnel* of any such tribunal. The interests involved are commonly so enormous and the forces of national sympathy, pride and prejudice, are so searching, so great and so subtle, that I doubt whether a tribunal, the membership of which had a character of permanence, even if solely composed of men accustomed to exercise the judicial faculty, would long retain general confidence, and, I fear, it might gradually assume intolerable pretensions.

There is danger, too, to be guarded against from another quarter. So long as war remains the sole court wherein to try international quarrels, the risks of failure are so tremendous, and, the mere rumour of war so paralyzes commercial and industrial life, that pretensions wholly unfounded will rarely be advanced by any nation, and the strenuous efforts of statesmen, whether immediately concerned or not, will be directed to prevent war. But if there be a standing court of nations, to which any power may resort, with little cost and no risk, the temptation may be strong to put forward pretensions and unfounded claims, in support of which there may readily be found, in most countries (can we except even Great Britain and the United States?) busybody Jingoes only too ready to air their spurious and inflammatory patriotism.

There is one influence which by the law of nations may be legitimately exercised by the powers in the interest of peace—I mean Mediation.

The Plenipotentiaries assembled at the Congress of Paris, 1856, recorded the following admirable sentiments in their twenty-third protocol:—'The Plenipotentiaries do not hesitate to express, in the names of their governments, the wish that states between which any serious misunderstanding may arise should, before appealing to arms, have recourse as far as circumstances may allow to the good offices of a friendly power. The Plenipotentiaries hope that the governments not represented at the Congress will unite in the sentiment which has inspired the wish recorded in the present protocol.'

In the treaty which they concluded they embodied, but with a more limited application, the principle of mediation, more formal than that of good offices, though substantially similar to it. In case of a misunderstanding between the Porte and any of the signatory powers, the obligation was undertaken 'before having recourse to the use of force, to afford the other contracting parties

the opportunity of preventing such an extremity by means of their mediation' (Article 8). Under this article Turkey, in 1877, appealed to the other powers to mediate between her and Russia. It is not, perhaps, to be wondered at, considering the circumstances, that the appeal did not succeed in preventing the Russo-Turkish war. But the powers assembled in the African Conference at Berlin were not discouraged from repeating the praiseworthy attempt, and in the final act of that Conference the following proviso (Article 12) appears:—

'In case of a serious disagreement arising between the signatory powers on any subjects within the limits of the territory mentioned in Article 1 and placed under the *régime* of commercial freedom, the powers mutually agree, before appealing to arms, to have recourse to the mediation of one or more of the neutral powers.'

It is to be noted that this provision contemplates not arbitration but mediation, which is a different thing. The mediator is not, at least in the first instance, invested, and does not seek to be invested, with authority to adjudicate upon the matter in difference. He is the friend of both parties. He seeks to bring them together. He avoids a tone of dictation to either. He is careful to avoid, as to each of them, anything which may wound their political dignity or their susceptibilities. If he cannot compose the quarrel, he may at least narrow its area and probably reduce it to more limited dimensions, the result of mutual concessions; and having narrowed the issues, he may pave the way for a final settlement by a reference to arbitration or by some other method.

This is a power often used—perhaps not so often as it ought to be—and with good results.

It is obvious that it requires tact and judgment, as to mode, time and circumstance, and that the task can be undertaken hopefully, only where the mediator possesses great moral influence, and where he is beyond the suspicion of any motive except desire for peace and the public good.

There is perhaps no class of question in which mediation may not, time and occasion being wisely chosen, be usefully employed, even in delicate questions affecting national honour and sentiment.

Mr. President, I come to an end. I have but touched the fringe of a great subject. No one can doubt that sound and well-defined rules of International Law conduce to the progress of civilization and help to ensure the peace of the world.

In dealing with the subject of arbitration, I have thought it right to sound a note of caution, but it would, indeed, be a reproach to our nineteen centuries of Christian civilization, if there were now no

better method, for settling international differences, than the cruel and debasing methods of war. May we not hope that the people of these States and the people of the Mother Land—kindred peoples—may, in this matter, set an example, of lasting influence, to the world? They are blood relations. They are indeed separate and independent peoples, but neither regards the other as a foreign nation.

We boast of our advance and often look back with pitying contempt on the ways and manners of generations gone by. Are we ourselves without reproach? Has our civilization borne the true marks? Must it not be said, as has been said of religion itself, that countless crimes have been committed in its name? Probably it was inevitable that the weaker races should, in the end, succumb, but have we always treated them with consideration and with justice? Has not civilization too often been presented to them at the point of the bayonet and the Bible by the hand of the filibuster? And apart from races we deem barbarous, is not the passion for dominion and wealth and power accountable for the worst chapters of cruelty and oppression written in the world's history? Few peoples—perhaps none—are free from this reproach. What indeed is true civilization? By its fruit you shall know it. It is not dominion, wealth, material luxury; nay, not even a great literature and education wide spread—good though these things be. Civilization is not a veneer; it must penetrate to the very heart and core of societies of men.

Its true signs are thought for the poor and suffering, chivalrous regard and respect for woman, the frank recognition of human brotherhood, irrespective of race or colour or nation or religion, the narrowing of the domain of mere force as a governing factor in the world, the love of ordered freedom, abhorrence of what is mean and cruel and vile, ceaseless devotion to the claims of justice. Civilization in that, its true, its highest sense, must make for peace. We have solid grounds for faith in the future. Government is becoming more and more, but in no narrow class sense, government of the people, by the people, and for the people. Populations are no longer moved and manœuvred as the arbitrary will or restless ambition or caprice of kings or potentates may dictate. And although democracy is subject to violent gusts of passion and prejudice, they are gusts only. The abiding sentiment of the masses is for peace—for peace to live industrious lives and to be at rest with all mankind. With the prophet of old they feel, though the feeling may find no articulate utterance: 'How beautiful upon the mountains are the feet of him that bringeth good tidings, that publisheth peace.'

Mr. President, I began by speaking of the two great divisions—American and British—of that English-speaking world which you and I represent to-day, and with one more reference to them I end.

Who can doubt the influence they possess for ensuring the healthy progress and the peace of mankind? But if this influence is to be fully felt, they must work together in cordial friendship, each people in its own sphere of action. If they have great power, they have also great responsibility. No cause they espouse can fail: no cause they oppose can triumph. The future is, in large part, theirs. They have the making of history in the times that are to come. The greatest calamity that could befall would be strife which should divide them.

Let us pray that this shall never be. Let us pray that they, always self-respecting, each in honour upholding its own flag, safeguarding its own heritage of right and respecting the rights of others, each in its own way fulfilling its high national destiny, shall yet work in harmony for the progress and the peace of the world.

RUSSELL OF KILLOWEN.

THE USES OF LEGAL HISTORY [1].

I FEEL much honoured by being permitted, although almost a complete stranger to you, to address the members of this Association at its nineteenth annual meeting. My theme, as you are aware, is 'The Uses of Legal History,' but I hasten to inform you that I am neither a professor of, nor an expert in, history of any sort, and that I do not, therefore, imagine for a moment that I shall be able to tell you anything new. The most I can expect to accomplish is to put before you old knowledge in a new light. Another reason, not personal to myself, why I am conscious of diffidence, is this. I am satisfied that in some of your States the standard of legal education is a very high one, higher, indeed, than in my own country. In addition to the legal classes held in your numerous colleges, you have, if I am not misinformed, no less than seventy-five law schools, of which sixty-eight are associated with universities. The reputation of at least one of these, the Harvard Law School, is well known throughout Europe. In Baltimore, I believe, a student may acquaint himself with the lower branches of jurisprudence at the University of Maryland, and afterwards pursue its higher branches at the Johns Hopkins University in the same city. These are solid testimonies to the thoroughness of your educational methods, and many more might be added to them.

In London, although it is the capital of an empire and a central seat of justice, no such advantages are to be had. We have, indeed, a Council of Legal Education, chosen by the four Inns of Court, which works conscientiously and well. But the limits assigned to it by the Inns do not admit of its doing much more than instil elementary knowledge, and that for the most part of a strictly business description. The only university London possesses is not a teaching university at all, but a mere examining board—a defect which has of late occupied the attention of many educational reformers and two Royal Commissions. The latter of these commissions reported two years ago in favour of making the so-called 'University of London' a teaching as well as an examining university, and to that end recommended the appointment of

[1] A paper read at the annual meeting of the American Bar Association held at Saratoga Springs, New York, on August 19, 20, 21, 1896.

a statutory commission armed with power to carry out a definite scheme of which they furnished an outline. I am happy to say that early in last July a bill was introduced into Parliament by the present government for the appointment of such a statutory commission. The state of business in the House of Commons during the session which closed last week necessitated the postponement of further progress with this measure until next year, but there is good ground for hoping that before long the singular anomaly, almost amounting to a scandal, that London should alone of all the great cities of the world be without a teaching university, will have been done away with.

The condition of our legal education being what I have described, it is not surprising that English lawyers, bred like myself amid the turmoil of the Courts, should be reproached by continental observers with knowing little about the science of law, or the relation which the English system of jurisprudence bears either to those that have preceded it, or to those that now prevail in other parts of the civilized globe. England, we are told, produces many first-rate advocates, occasionally very great judges, but rarely a scientific, or a comparative jurist. The imputation is, I am bound to admit, not wholly unfounded. With some of our judges and practitioners the very word 'jurist' is in bad odour. 'I will tell you what a jurist means,' said not long ago a distinguished member of our bench, prematurely, alas, taken away from our midst: 'A jurist is a man who knows a little of the law of every land except his own.' That the saying should have survived is prima facie evidence that our continental critics are right. It survived because it was thought to be witty, and there can be no real wit without a grain of truth, or at least what is deemed to be truth by those who regard it as wit.

So long as legal principles lie embedded in masses of reported cases, not always to be reconciled with one another, it is hopeless to expect that English law can be looked upon from the scientific point of view by those who pursue it professionally. A collector of herbs is not a true botanist, skilled though he may be in the knowledge of specific plants. Unless he understands how to classify them, unless he can tell us something of their native habitats and their family relationships, he is a collector and nothing more. So of most of our practising lawyers. They have at their fingers' ends a large number of authorities, which they manipulate, discuss, and apply, according to the exigencies of the hour; but case-knowledge is not scientific knowledge, any more than the particular is the general.

As is the common run of legal practitioners, so is the

common run of our legal text-books. We have in our libraries a number of monographs, dealing with the sub-heads of law in minute detail—books on torts and contracts, on settlements and wills, on purchases and sales, on specific performance, on negotiable instruments, and so forth. We have also many valuable compendia, or institutional treatises, dealing with the law as a whole. Each and all of these bear witness to the disjointed character of our jurisprudence. The numerous monographs overlap and jostle each other, like rudderless boats tossing at random on the surface of a wind-swept lake. The institutional treatises, in their endeavour to be exhaustive, fail in point of logical arrangement, as vessels overladen with a mixed cargo fail to get it properly stowed away in the hold. Some day, perhaps, we shall produce a Corpus Juris which will reduce this legal wilderness to order. But if we would lay bare the living forest we must first grub up the decayed trees. We have already digested with success portions of our civil law, notably that relating to Bills of Exchange, and a part of that relating to Partnership and Trusts. These experiments will doubtless be renewed from time to time until ultimately we shall get a civil code as complete as that which has just been promulgated in Germany. At present we have not even a criminal code such as you have in the State of New York and as is to be found in most continental countries, all that has been done in that direction being to pass five consolidating statutes dealing with larceny and a few other common offences.

But I am digressing at the very outset of the journey, and I must return to the main track.

To insist before an audience like this on the abstract value of legal history is, of course, wholly needless. I shall, therefore, assume that point and confine myself to illustrating it. Before proceeding further, however, I should like to say a word or two on the analogy between an inquiry into legal history and an inquiry into the origin of language. How, asks the scientific philologist, did language come to be at all? Was it a heaven-sent gift, born in an instant of some divine afflatus, or was it elaborated slowly and painfully from the rude articulation of reasoning beings? Which was the first language, or, if there was no first language, how many centres of language were there, and what were the processes of their several developments? A comparative review of different tongues in different ages can alone furnish the true answer. So, also, as regards jurisprudence. Whence, asks the legal historian, came the ideas which are now part and parcel of every system of law? What is the origin of property? What the early conception of contract? How far was

the right of testamentary disposition recognized by primitive societies? Whence came the notion of crime, as an offence against the State? Whence the idea of a corporation, as distinct from the individual members composing it? Questions these as deep and absorbing as the problems of primitive language, and, like them, only to be solved by recourse to the historical method.

Again, when we pass from the consideration of the origin of legal ideas to their process of development, language furnishes us with an analogy. The student of language does not confine himself to speculations on the origin of speech, or the canons of phonetic change, such as Grimm's law and the like. He loves to investigate the dialectic varieties of some particular language with which he is already familiar. He wants to know all about the different elements which compose it, and how much of it is derived from foreign sources. The better he succeeds in doing this, the more he enhances his own literary enjoyment. For language, thoroughly understood, is interesting as language, apart from the thoughts it clothes, and the prosiest prose or the tamest poetry may be redeemed from the commonplace by memories which the mere phraseology calls up.

A corresponding pleasure—I do not now speak of profit, I shall have a word to say on that, too, later on—may be derived from the study of early English law. With the aid of historical research, what at first sight seemed dead will kindle into life, and even old and withered forms of legal pleading will revive and blossom as the rose.

And here let me administer a caution to the novice as to the attitude of mind he should observe when he enters on the study of legal history. His attitude should be essentially a neutral one. He must shake himself free from all modern preconceptions. He must be prepared to throw himself into the remote past by an effort of imagination. He must realize, as intensely as he can, the scenes which the drama of humanity was then unfolding to the world—scenes on which the great stage-manager, Time, has long let the curtain fall.

Take, for example, the early history of contract. It is easy for all of us here present to see that the essence of a contract consists in the assent of two wills to the same subject-matter, and that the obligation to perform a promise is a thing binding in law, provided there is good or valuable consideration for it. Yet the conception of contract, as we thus know it, is of comparatively modern growth; powerful states having existed and flourished which paid very small attention to contract. The reason of this is an historical one. Contract, in its simplest form, implies the free

agency of two individuals. But in the patriarchal period of society, individuals were not free, were scarcely individuals at all as we now understand that word. The rules they obeyed were derived, first, from the station into which they were born, and next from the imperative commands addressed to them by the chief of the household of which they formed an integral part. This is only one illustration out of many that might be given.

In point of fact, the ancient legal conceptions no more correspond to the modern than the morality of the olden time corresponds to the morality of to-day. In the patriarchal period, it was not thought immoral for a Jacob to supplant an Esau by practising a trick on his blind and aged father, nor for a Jael to slay a Sisera when sleeping peacefully in her husband's tent. The age of Homer was an age of heroes animated by high courage and devotional piety; yet in the Homeric literature, as Sir Henry Maine has pointed out, the deceitful cunning of Ulysses appears as a virtue of the same rank with the prudence of Nestor, the constancy of Hector, and the gallantry of Achilles. Even now the boundary between law and morals shifts as the sands of the sea shift with the ebbing and the flowing tide. The tendency of civilization is to enlarge the first at the expense of the second, to convert the voluntary morality of one generation into the obligatory law of the next. Instances of this will at once occur to you, both in the civil and the criminal law. One of them is furnished by the doctrine of fraud. Fraud may be a moral delinquency, a civil tort, or a crime. For a tradesman to pass off his goods as another's was at one time a moral delinquency only. It is now a civil tort, which may be restrained by injunction or redressed by damages. Every fresh remedy given by the civil courts against fraud trenches *pro tanto* on the field of morals and enlarges the field of positive law. Every statute which creates a fresh crime does precisely the same thing. The English Criminal Law Amendment Act of 1885, the Act for the punishment of fraudulent trustees, the provisions of our Merchant Shipping and Public Health Acts, which have converted into criminal offences what were once at most actionable wrongs, are instances in point.

Passing on from the general inquiry into the nature of legal conceptions, the next question which attracts the legal historian is, how have these conceptions become interwoven into the particular system of law which he desires to investigate? Let us suppose that this system is our own and confine ourselves to that. What is the origin of Anglo-American law, that is to say, of that large body of jurisprudence which your country and mine possess in common? The answer you will have already anticipated. Its origin is composite like that of the race itself. Its staple is

unquestionably Anglo-Saxon, but there is a large admixture besides. It may, for all we know, hold a British or Celtic element concealed in some unknown form which has hitherto eluded our vision. It is certain that it contains a Scandinavian element imported by the Danes, and a Frankish element imported by the Normans. The extent to which the Roman law has also entered in is a matter on which there is much difference of opinion. That it did enter in, to a large extent, without becoming, so to speak, naturalized amongst us, I, for one, fully believe, and with your permission I will shortly state my reasons. They may be taken as supplemental to those furnished by Mr. Howe, of New Orleans, in the able paper he read to this Association at Detroit last year.

We start with the undeniable fact that for more than three centuries Britain was entirely a Roman province, and was occupied by Roman legions for more than five centuries. Papinian, one of the most famous of Roman jurisconsults, dispensed justice in the forum of York, if we may trust Dion Cassius, writing in the third century; and according to a tradition current at the time of the Commonwealth, and which is vouched for by John Selden, no mean antiquarian authority, Ulpian, and Paulus, venerable names familiar to every student of the law of Rome, exercised the functions of assessors in other parts of the island. Now, just as the characteristic of ancient Greece was a love of art, so the characteristic of ancient Rome was a love of law and order. It would, therefore, be, indeed, strange if Roman jurisprudence, though planted originally in Britain by force of arms, had not left its mark behind long after the victorious legions had been withdrawn.

I am aware that Sir Frederick Pollock and Dr. Maitland, in their monumental work on the History of English Law, published in 1895, contend the contrary of this, and maintain that at no time was Roman law introduced into England first-hand—at least on any appreciable scale. They admit, however, that it found its way there as early as the eighth or ninth century 'at a second remove,' and that this introduction was effected through the English clergy, who brought with them Latin forms and phrases primarily intended for ecclesiastical affairs, but capable of adaptation to affairs secular. They also admit that with the Norman invasion a further importation of Roman law took place, the Dukes of Normandy having adopted the official machinery of the Frankish Government, including, of course, whatever Roman elements had been taken up by the Franks. They observe further that in this way institutions which have nowadays the most homely and English appearance may be connected through the customs of Normandy with the system of government elaborated in the latter centuries of the Roman Empire.

These statements, coming from so authoritative a quarter, are unimpeachable testimony to the existence of Roman law in England long before the middle of the twelfth century, when the Roman Digest first began to be regularly expounded in Italy. After that date its influence became, as is well known, more marked. The powerful school, or university, formed in Bologna about the year 1150, attracted students of Roman law from all parts of Western Europe, including the British Isles, and such seeds of it as had already taken root on British soil thenceforward acquired fresh force and vitality. About the same time the canon law of Rome (which was deeply impregnated with the Roman law, although it had an independent origin) reared its head throughout the continent, greatly strengthened, as it was, by the publication of the collection of conciliar and papal decrees known as the *Decretum Gratiani*. This canon law was administered in Britain by the bishops, side by side with the secular law of the King's courts, as is shown by the fact that the Constitutions of Clarendon provided, in the year 1164, a ready method of settling any conflict between the two jurisdictions. Much of the canonical jurisprudence still survives in the law relating to wills of personalty, and down to quite recent times it was an important factor in the law relating to married women. In England, Divorce Acts and Married Women's Property Acts have of late 'changed all that,' and the advent of the New Woman has stamped the change as irreversible.

The argument in favour of the influence of the Roman law upon our own is greatly strengthened if we turn to the work attributed to Henry de Bracton, Justice of the King's Bench in the reign of Henry III. Bracton's method (like that of Azo of Bologna from whom he largely borrowed) is the same as that of Justinian's Institutes, and numerous passages from the Digest and the Code are scattered throughout his pages. To determine the precise extent to which Bracton 'Romanized the English law' or 'Anglicized the Roman law,' is, however, by no means easy. Opinions on the point greatly differ. They were collected some time ago by my friend Mr. T. E. Scrutton in a paper which he contributed to the English LAW QUARTERLY REVIEW, and I have his leave to reproduce them here.

Mr. Reeve, the well-known legal historian, thinks that the Roman law was only used by Bracton as an illustration and an ornament, and was not regarded as an authority, and he doubts whether the Roman parts of his work would if put together fill three whole pages. M. Houard, on the other hand, is so struck with Bracton's Romanizing tendencies as to omit him entirely from his collection of Anglo-Norman legal sources, viewing him as a polluter of the

pure stream of English law. Sir Henry Maine speaks of the 'plagiarisms of Bracton,' and considers it one of the most hopeless incidents in the history of jurisprudence that an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law, a treatise of which the entire form and a third of the contents were directly borrowed from the Digest. Biener, like Reeve, holds that Bracton, although citing much Roman law, attributed no authority to it. Spence, on the other hand, declares that there is scarcely a principle of law stated in Bracton which may not be traced back to the Digest or the Code. *Quot homines, tot sententiae.*

Mr. Scrutton's own view, in which I venture to concur, strikes a mean between these opposite conclusions. As regards the first part of Bracton's work which deals with the law of persons, the different modes of acquisition, and the nature of contracts, this, probably, was copied directly from Roman sources, and, as English law, was new; while the second part, which deals with donations, possession, inheritance, and the theory of actions, was partly old English law, and partly law derived from the Roman which the decisions of a long line of clerical judges had made law of the land.

Let me now push the argument a little further by enumerating a few instances of the way in which our early jurisprudence closely resembles that of Rome.

I will begin with the ideas which lie at the root of English real property. No lawyer will deny that if we wish to understand the elements of real property law, we must study the feudal system. Feuds are the fountain whence our notions of proprietary right in the realty originally flowed. Thither the student in conveyancing must still resort for the principles, and even the practice, of his art. Other branches of jurisprudence may be taught, without quoting obsolete usages; but it is not so with the law of real property. The elements of that law lie remote in the annals of the fiercest and darkest period—a period, as has been well said, of lawless chiefs, and armed retainers, dwelling under a system, turbulent in its vigour, and corrupt in its decline, yet destined even when in ruins to influence the habits and mould the institutions of the most enlightened nations of Europe.

At first sight, this feudal system, and the incidents of land tenure which were part of it, appear to be peculiarly Teutonic, but even here an affinity with Roman practice, if not the direct influence of Rome, may be clearly discerned. A close analogy exists between the well-known relations of the feudal lord to his vassal and that of the Roman patron to his client. The Roman client was, I need not remind you, bound to treat his

patron with reverence, to furnish him with aid to marry his daughter, and to redeem him when taken captive—incidents these inseparable from the feudal relationship, and expressly reserved to the feudal lord by the Magna Carta of King John. 'The patron,' says Dionysius of Halicarnassus, 'was the legal adviser of the client. He was the client's guardian and protector as much as he was the guardian and protector of his own children. He maintained the client's suit when he was wronged, and defended him when he was charged with having wronged another. The client in return for these services was bound to accompany his patron to war.' Compare with this description the relation between the feudal lord and the feudal vassal. What was the principle of a fief? A mutual contract of fidelity and support. It laid on the lord the obligation of protecting his vassal; it imposed on the vassal the duty of military service towards his lord.

But this is not all. Tacitus in his Germania records the fact that a practice had grown up in his day of committing to the care of Roman veterans, or to the Gallic or German tribes, that part of the public domain which was on the extreme frontier, to be held by them and their descendants on the condition of their performing soldier service for the state. The title to the lands thus granted, which were known as *agri limitrophi*, passed by delivery of possession. There is surely here more than an accidental resemblance to the tenure of land which was in force in England until the 12th of Charles II, and to the 'livery of seisin' which was in general use there as late as 1845, and has never been formally abolished.

Again, the characteristic distinction between the legal and the equitable ownership of land finds a precise correspondence in that which subsisted at Rome between property held *jure Quiritium* and property held *in bonis*. The analogy is the more significant because such a severance of law and equity is by no means general. Gaius notices it as a peculiarity of the Roman system, and contrasts it with the absolute ownership which alone was elsewhere recognized.

Another point of contact with Rome is to be found in the English doctrine of 'uses' and 'trusts.' How far these were actually derived from Roman law has been much debated, and will continue to be so. Ingenious have been the conjectures started by the anti-Romanists in their efforts to find for them an independent origin. We are told by some—and your own countryman, Mr. Justice Holmes, whose great learning commands my deepest respect, was, I think, the author of the discovery—that the feoffee to uses corresponds point by point to the Salman of the early German law as described by Beseler in his Erbverträgen some sixty years ago. The Salman was unquestionably a person to

whom land was transferred in order that he might make a conveyance according to the grantor's direction, but the conveyance was generally only to take effect after the grantor's death, the grantor reserving to himself the enjoyment of the land during his life. Notwithstanding this posthumous character of the Salman, Mr. Justice Holmes considers that his likeness to the feoffee to uses is such as to warrant the inference that the latter was but the former transplanted. I confess to be old-fashioned enough not to be convinced by this reasoning; I prefer to assign the 'use' to a still older foster-parent than the Lex Salica, viz. to that to which, for aught we know, the Lex Salica may have been itself indebted, I mean the *fideicommissum* of the later Empire. *Fideicommissa*, as every student of Roman law knows, were originally introduced in connexion with the law of wills. At first they were precarious, depending entirely on the honour of the trustee, but they were ultimately placed under the protection of an established public functionary, the *praetor fideicommissarius*. The object of imposing the *fideicommissum* was to evade the strict rules of the civil law by transmitting property to aliens and others who were legally incapacitated from taking anything directly under the will of a Roman citizen. No one looking at the early history of English equity can fail to see the parallel. The observance of the 'use' or 'trust' was enforced by the early clerical chancellors precisely in the same way as the *fideicommissum* was protected by the Roman praetors. Its object, too, was strictly analogous, namely, to evade the strict rule of the statute law, which prohibited alienation in mortmain.

The catalogue of points of resemblance between the Roman system and the English might, if time permitted, be greatly extended. I will only mention a few more items. Every one must agree that our law of easements owes its origin to the Roman servitudes, and Lord Holt's judgment in the celebrated case of *Coggs* v. *Bernard* shows how much our law of bailment coincides with, if it was not derived from, the Roman learning on the same subject. The distribution of an intestate's personalty under the statute of Charles II is based on the Novellae of Justinian, and so is our mode of reckoning degrees of kindred. The *Donatio mortis causa*, the *cessio bonorum*, the doctrine of the property, or absence of property, in *ferae naturae*, were all directly borrowed from the law of Rome, the very names of the things borrowed having survived to bear witness to that fact.

I now pass on to say a few words upon another and distinct branch of the history of our jurisprudence, viz. its internal development. Just as the annals of the language of a country cannot be regarded as complete which do not tell us something of the growth

of its literature and mark the epochs of its greatest writers; so, no legal history can be perfect which does not show us how our domestic law has adjusted itself by slow degrees to the social wants of the people. We must not forget that, after all, the effective laws of a country are only an expression of the national tone and temper for the time being. Legislation can never 'force the pace'; it must always lag behind, rather than precede, the popular demand for it. The connexion which subsists between the outward circumstances of society in any particular age and the legal characteristics of that age may not, indeed, be always clear, but it is certain that the more we know of the antecedent historical facts, the more thorough is the insight we gain into the law which is their product. As Mr. E. J. Phelps said in a speech which he made in Edinburgh some ten years ago: 'Law, however fundamental, is but the reflex of public opinion, and in the long run, in a free country, must be maintained by that opinion or must perish.'

Again, just as law is modified by history, so is history in some degree modified by law and even by legal forms. Of this truth there are many illustrations from which I will only select two.

Consider the effect which the Norman form of tenure had on the power of the Crown. According to continental feudalism, the vassal owed allegiance to his immediate lord, and not to the lord paramount, who was, in England, the king. Hence, whenever the king and the immediate lord happened to be in opposition to each other, continental feudalism strengthened the hands of the lord and weakened the hands of the king. The Conqueror wisely insisted that (contrary to the feudal principle) allegiance should be owed direct to the king and not to the immediate lord. This innovation coloured the course of our constitutional history right down to the time of William and Mary.

Consider, again, the effect of the arbitrary and cruel forestal laws which the Conqueror introduced to protect his favourite diversion of hunting. These forestal laws were the occasion of many of the terrible disorders of those times, and had an important bearing on our early social history.

Consider, again, how legal changes helped to work social changes during the stirring wars of the Roses. Then was introduced the fiction of the common recovery, which dealt a fatal blow to family entails, and, by rendering the lands of the nobility forfeitable for treason, caused them to be subdivided amongst the wealthier members of the middle class. The frequent conveyances to uses to be met with at this period were due to the same increasing desire to shake off the feudal yoke, and to escape the consequences of attainder. Indirectly, too, these same 'uses' had a result much more

far-reaching than was originally contemplated. The plasticity of the equitable estate, through the medium of the use, favoured and developed the operations of commerce, which was only then beginning to form an element in our national life.

I must not attempt to follow out this train of thought, as exemplified in more recent times, for it would take too long. I return to the internal development of our jurisprudence and the interesting field of inquiry which it presents to the legal historian. In the department of common law, we may investigate the growth of our mode of trial from the inquisitors of the Frankish kings, through the recognitors of the Anglo-Norman period, down to the jurors of our own day—the histories of the actions of debt, assumpsit, and case—the gradual simplification of pleading—the development of the law relating to promissory notes and bills of exchange—the systematization of the law of insurance—the successive alterations of the rules of evidence from the time when no interested person could, even in a civil cause, be called as a witness on his own behalf, down to the passing of the several measures in the United States and the Australian colonies (England herself cannot yet be included), by which such evidence is admissible in all cases, whatever the cause of action or the nature of the crime charged.

In the department of Equity we may trace the stages by which the chancellor, emerging from his original position as secretary to the king, came to be the head of an independent Court, administering relief in cases not within the jurisdiction of the ordinary Courts. We may watch the long line of clerical chancellors from the reign of Richard II to the 21st of Henry VIII, conspiring to form a distinct code of rules, by which the enjoyment and alienation of property should be regulated on principles varying in many essential particulars from the system recognized by the lay judges of the King's Bench or Common Pleas. We may distinguish the different means by which, in spite of the Statute of Uses, the jurisdiction of the Court of Chancery continued unimpaired, and note how the judges who promulgated the dogma that 'there could be no use on a use' completely defeated their own ends.

We may watch the notion of the existence of a general equity in a mortgagor to redeem the mortgage after forfeiture, gradually but surely gaining ground from the middle of the fourteenth century until it became completely established in the reign of Charles I. We may notice in the reign of James I the earliest recognition of the capacity of the wife to enjoy property apart from her husband by virtue of an ante-nuptial deed, and the independence thus gained further secured by the restraint on anticipation said to have been invented by Lord Chancellor Thurlow in the reign of George III.

ages of the earth may be read in some perpendicular section of its surface.'

With this expressive simile, for which I am indebted to John Stuart Mill, I might well conclude, but there is one other aspect of legal history which we cannot leave out of sight since it confronts us on the path which as professional men we are called upon to tread.

It is the boast of some English practitioners, and it may be the boast of some Americans also, that they want to know the law of to-day and do not care to trouble themselves about the law as it was centuries ago. Well, but is not our legal system, a system of government of the living by the dead, and is it possible fully to understand the law of to-day without some knowledge of ancient law? Once we admit that we have to be guided by authority, we must also admit that we cannot read authority aright unless we can truly estimate the conditions and qualifications under which alone it can be safely applied. These conditions and qualifications can only be known by going back to the source of the authority, by considering the material or social needs which called it into existence. Take any legal doctrine that has come down to us through the ages, crystallized, perhaps, into a phrase. Nothing is easier than to accept such a phrase as settling a disputed point out of hand, and nothing more dangerous. Half one's time as an advanced practitioner is spent in mastering the limitations of formulae which as students we swallowed whole and retained undigested. When we have tracked a principle home, we find very often that it has to be re-stated, and that when so re-stated it throws quite a different light on the matter in hand, or else (no uncommon discovery) that it has no bearing at all.

Let me demonstrate the practical value of archaic law by one or two examples.

The English system of common law pleading was finally swept away by the English Judicature Act of 1873. It had been encumbered with obsolete learning, and had been terribly abused by the ingenuity of pleaders during centuries of adroit manipulation. The abuses were not, I think, organic, and much had been done to remedy them; but the system had fallen into discredit, and had become the scape-goat for the sins of the profession. It was determined that it should no longer be necessary to plead formal causes of action, but that each party should tell shortly his plain tale unfettered by technicalities, or, as the rules expressed it, that his pleading should contain, and contain only, a summary statement of the material facts on which he proposed to rely. The change was of enormous historical importance. The old system had been

The doctrines of specific performance, of the relief against penalties and forfeitures, of mistake, of election, of executory trusts, and numerous others, we can refer in like manner to their original sources; and so estimate the value of the labours of a Nottingham, a Hardwicke, and an Eldon, according to the contributions they each have made to the fabric of our equity jurisprudence.

Again, in the history of the way in which devises came into vogue we shall find the only true theory of wills of realty, from their first legalization in the reign of Henry VIII to their assimilation in England to wills of personalty at the commencement of Queen Victoria's reign. We may note how the Statute of Wills gave effect at law to what had previously been mere declarations of uses in equity, and how precedents which before the Statute was passed had served for the latter purpose only were resorted to, after the Statute, for disposing of the legal estate upon death. From this two important consequences will be seen to follow. The first was that the will was regarded as a present conveyance of land limited to take effect at a future date, and therefore not to include after-acquired property, a view which prevailed in England down to 1837, and in Scotland for many years later; the second that the legal limitations of devises came to be interpreted with the same latitude as the uses from which they had sprung. This is the explanation of the fact that wills of lands retained their elastic character after they had been taken out of the exclusive dominion of equity, and continued to be subject to a different code of rules from that which the rigour of the feudal system had required for the construction of deeds.

Studying our law in this way, first in its general outlines, then in its special departments, we shall be studying English history as well. We shall also be liberalizing and expanding our ideas. If engaged in the practice of our profession, we shall escape being made its slave; if about to enter it, we shall be laying a broad foundation, which will aid us in grappling with its details, because the historic clue will be in our hands. Each principle we apply will carry with it the association of the time when it was first enunciated, while an insight will be gained into the social and political life of the past, as reflected in the mirror of the present. For, in the world of law, as in the physical world, every commotion and conflict of the elements has left its mark behind in some break or irregularity of the strata. 'Every struggle which ever rent the bosom of society is apparent in the disjointed condition of the field of law which covers the spot, and the several products of the several ages of English history may be seen there side by side, not interfused, but heaped one upon another, as many different

the mould upon which the whole common law had been gradually formed. All legal conceptions had been defined, analyzed, and formulated through the operation of that elaborate machinery. It provided a natural classification of the law, saving it from absolute chaos, so that students learnt their principles as they went along by mastering their procedure.

Declarations, pleas, and demurrers have now become matters of antiquarian interest, so far as actual practice is concerned. But, until the whole system of English law shall be recast and codified, the old learning respecting them will be indispensable to all who wish to be sound common lawyers. Without it a great deal of quite recent authority will remain obscure, and the old books in great measure unintelligible. Even in so simple a matter as an action of contract, it is necessary to know the peculiar, and not unromantic, history of the action of assumpsit. In an action for injuries against a carrier, we must still be familiar with the distinction between a breach of the duty to carry safely and a breach of the contract to carry, though we are no longer put to a choice between the one and the other form of action. And, so long as written pleadings remain, the best masters of the art will be they who can inform the apparent licence of the new system with that spirit of exactness and self-restraint which flows from a knowledge of the old.

Let me take, as a second illustration, a case which occurred in England a few years ago. Nothing at first sight seems simpler than the maxim, 'Quicquid plantatur solo, solo cedit.' It is first met with, so far as I am aware, in this precise form in Wentworth's Office of Executor, published in 1641, but it is to be found both in Gaius and the Digest, though in slightly different terms. The statement in the Digest is this: 'Cum in suo solo aliquis aliena materia aedificaverit, ipse dominus intelligitur aedificii, quia omne quod inaedificatur solo cedit.' But under what circumstances is the rule applicable, and are there any exceptions to it? This was the very question that arose in the case I am about to mention.

The plaintiffs were landowners in one of the mining districts of Derbyshire; the defendants were owners of a lead mine situate under the plaintiffs' soil, and they had the right, by a local statute, to search there for veins of ore. The defendants had erected buildings on the plaintiffs' land in aid of their mining operations, but when the mines proved unremunerative they pulled these buildings down and sold the materials. The action was brought by the owners of the surface to recover the value of these materials, on the plea that, as soon as the buildings were erected, they, and all that was fixed to them, became the property of the surface-